IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 598.

ALBERT H. WAITE, PETITIONER,

vs.

THE CITY OF SANTA CRUZ, RESPONDENT.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

ARGUMENT.

Part I.

ANSWER TO PETITION.

Ground Stated in Petition Insufficient to Justify Issuance of Writ.

This is a petition for a writ of *certiorari* to the United States circuit court of appeals for the ninth circuit to bring up for review the decision rendered by that court in the

case of "City of Santa Cruz *vs.* Albert H. Waite" (a case arising under and upon the statutes of California), upon the ground, and solely upon the ground, that said court erred in construing and applying certain decisions of the Supreme Court rendered in other and prior cases arising upon the statutes of States other than California.

The language of the petition, stating the ground thereof, is as follows:

"Your petitioner states that the said judgment of the "United States circuit court of appeals is contrary to law "and directly contrary to the decisions of this Supreme "Court, especially in the case of Hackett *vs.* Ottawa, 99 U. S., "86, and the case of Evansville *vs.* Dennett, 161 U. S., 434" (Petition, pages 2 and 3).

No other ground of application for the writ is stated in the petition. This, we submit, is an insufficient showing, even if it were well founded, to justify the issuance of a writ of *certiorari* in a case arising, as this case admittedly does, under section 6 of the act of March 3, 1891, creating the circuit courts of appeals.

The statute expressly denies to the defeated party the right to carry his case to this Supreme Court either by appeal or by writ of error, and limits his right to be heard in this court to cases certified here by circuit courts of appeals and such "extraordinary cases" as to this court may seem to justify interposition by the writ of *certiorari*. Certainly the mere allegation that the circuit court of appeals has erred in the construction and application of authorities does not in a matter affecting only the private interests of the litigants create such an "extraordinary case" as would justify interposition by *certiorari* in a matter in which Congress has expressly denied the right of appeal and of proceeding by writ of error to correct or review such errors as are here alleged.

In the case of American Construction Company *vs.* Jack-

sonville Railway, 148 U. S., 382, this court, discussing the meaning, object, and policy of the act, said:

"The primary object of this act, well known as a matter "of public history, manifest on the face of the act, and judi- "cially declared in the leading cases under it, was to relieve "this court of the overburden of cases and controversies, "arising from the rapid growth of the country, and the "steady increase of litigation, and for the accomplishment "of this object, to transfer a large part of its appellate "jurisdiction to the circuit courts of appeals thereby estab- "lished in each judicial circuit, and to distribute between "this court and those, according to the scheme of the act, "the entire appellate jurisdiction from the circuit and dis- "trict courts of the United States (McLish *vs.* Roff, 141 "U. S., 661, 666; Lau Ow Bew's case, 141 U. S., 583, and "144 U. S., 47).

"The act has uniformly been so construed and applied by "this court as to promote its general purpose of lessening "the burden of litigation in this court, transferring the ap- "pellate jurisdiction in large classes of cases to the circuit "court of appeals and making the judgments of that court "final, except in extraordinary cases."

This rule has been reiterated with equal positiveness in later cases, notably Forsyth *vs.* Hammond (166 U. S., 514, 515), in which the court said:

"While this power is coextensive with all possible neces- "sities and sufficient to secure to this court a final control "over the litigation in all the courts of appeal, it is a power "which will be sparingly exercised, and only when the cir- "cumstances of the case satisfy us that the importance of "the question involved, the necessity of avoiding conflict "between two or more courts of appeal or between courts of "appeal and the courts of a State or some matter affecting "the interests of the nation, in its internal or external rela- "tions, demands such exercise."

While petitioner in this case has chosen to denominate his proceeding as a "petition * * * for writ of certiorari," it is, in substance and effect, and even upon its face manifestly appears to be, a petition for a writ of error to reverse the final decision of a circuit court of appeals in an ordinary action at law, in which the diverse citizenship of the parties is the only basis of Federal jurisdiction.

To grant a writ of certiorari for the correction of such error as is alleged in this case would, we submit, tend to unsettle the views of the entire bar of the country with respect to the finality of all decisions of the circuit courts of appeals in cases coming within the terms of section 6 of the act of 1891, and would encourage, if not compel, applications for writs of certiorari in all such cases in which error might be fairly asserted on appeal or on writ of error. If the writ of *certiorari* should be granted in this ordinary case because of the errors alleged, why not in every case in which the defeated litigant can make a plausible showing of error in the opinion filed by the court of appeals?

2. Question involved not general, but local in character and effect.

Petitioner (Petition, p. 3) states that the decision complained of in this case "relates, not to a mere question of local law or importance, but to a question of commercial law affecting vast interests in every State of the Union."

The rule of commercial law referred to by petitioner is not, in any sense, questioned in this case. It has never been questioned by counsel for respondent, and it is as strongly stated in the prevailing opinion of the circuit court of appeals (Record, pp. 577 *et seq.*; 98 Fed. Rep., 391) as in any of the authorities which petitioner cites.

The question involved is the effect of the local laws of the State of California to exclude the bonds in question from the operation of that acknowledged rule of commercial law. The

competency of every State to limit and determine the scope and effect of recitals in municipal bonds issued under its laws has been uniformly upheld by this supreme court.

"It was entirely competent for a State to provide by "statute that all obligations, in whatever form executed by a "municipality existing under its laws, shall be subject to "any defense that would be allowed in cases of non-nego-"tiable instruments."

Gunnison County *vs.* Rollins, 173 U. S., 276.

The circuit court of appeals in this case, without in any manner questioning, but expressly conceding and asserting, the rule laid down in Hackett *vs.* Ottawa, Evansville *vs.* Dennett, Chaffee County *vs.* Potter, and Gunnison County *vs.* Rollins holds that certain provisions of the statutes of California, properly and competently enacted by the legislature of that State, so far limit the effect of recitals, in the particular bonds in question, as to enable the city of Santa Cruz to plead and prove the invalidity of the bonds as a defense to an action brought upon the bonds by an innocent holder for value.

On this point we respectfully invite a careful examination of the prevailing opinion of the circuit court of appeals (Record, pp. 577 *et seq.*; 98 Fed. Rep., 388 *et seq.*).

3. This is not in any sense an "extraordinary case," and does not present any other element justifying interference with the finality of the circuit court of appeals' decision.

The act (March 3, 1891) establishing the circuit courts of appeals "has uniformly been so construed and applied by this court" as to make "the judgments of that court final except in extraordinary cases" (Amor. Const. Co. *vs.* Jacksonville Railway, 148 U. S., 382), and the power,

by *certiorari*, to exercise "a final control over the liti-"gation in all the courts of appeal is a power "which will be sparingly exercised, and only when the cir-"cumstances of the case satisfy us that the importance of the "question involved, the necessity of avoiding conflict be-"tween two or more courts of appeal, or between courts of "appeal and courts of a State, or some matter affecting the "interests of this nation, in its internal or external relations, "demands such exercise" (Forsythe *vs.* Hammond, 166 U. S., 514, 515).

Counsel for petitioner admits that this is not an extraordinary case, saying: "In all these respects this case pre-"sents only the usual and ordinary case of negotiable mu-"nicipal bonds, and *there is absolutely nothing peculiar in this* "*case* except the decision and judgment of the circuit court "of appeals" (Brief, p. 5).

This declaration of counsel is true in all but its concluding phrase, which we hesitate to believe was intended as a slur upon one of the greatest and ablest courts of appeals of this nation.

Yet in that statement counsel have completely answered their petition for a writ of *certiorari*, and have stated themselves out of court.

We submit that a writ of *certiorari* to the circuit court of appeals should not be granted in a case arising under section 6 of the act of March 3, 1891, which does not involve any conflict between two or more courts of appeal nor between courts of appeal and the courts of a State, nor any matter affecting the interests of the nation at large, and which, it is admitted, presents only "usual and ordinary" questions, concerning which the law is well settled, and about which "there is absolutely nothing peculiar."

4. Other Questions Involved.

In the circuit court of appeals the judgment of the circuit court in this case was attacked by respondent herein on seventeen distinct grounds, only two of which were passed upon by the court of appeals.

Concerning its omission to pass upon the other questions involved in the case on appeal, that court in its opinion, after discussing the one question presented by petitioner here, said:

"Entertaining these views, it is not necessary to decide "any other point made and argued by counsel, except that "as to the jurisdiction of the court. We have no doubt of "the existence of jurisdiction" (Record, p. 589; 98 Fed. Rep., 393).

Of the fifteen points made by respondent against the judgment of the circuit court, which were left undecided by the circuit court of appeals, several are as important as the one decided in our favor, and, if decided in favor of this respondent, would involve and require the same judgment to be entered by the circuit court of appeals which is here complained of.

It seems to us that this fact, shown by the assignment of errors in the record and by the prevailing opinion of the circuit court of appeals, makes it incumbent upon the petitioner, if the writ of *certiorari* may properly issue in such a case as this, to show to this court that, as against all of said assigned errors, the judgment of the circuit court should have been affirmed—in other words, that the *decision* of the circuit court of appeals, *and not merely the reason given for its decision*, is erroneous.

5. No Moral Ground for Interposition.

As every application for a writ of *certiorari* in cases of this kind is addressed to the sound discretion of the court, moral as well as legal considerations appearing upon the face of the record may and should be considered by the court in granting or refusing the writ.

If a city having received full consideration for its bonds attempts, upon technical and doubtful grounds, to repudiate them, courts should undoubtedly encourage all lawful and honorable steps taken by the *bona fide* holders of such bonds to enforce their payment; but where, as in this case, a city has deen despoiled of its bonds, intended for sale, by an act rising to the evil eminence of larceny, receiving no consideration whatever therefor, and such bonds find their way into the hands of purchasers, not for "full value paid," as stated by petitioner (Petition, p. 3), but for various prices and by various methods (some by direct purchase, others by hypothecation as collateral security, etc.), and such bonds are held to be invalid and void in the hands of such purchasers (even assuming them to be innocent) by the highest appellate court to which citizens may of right carry such cases under the laws of the land; this court should not interpose a purely discretionary power to disturb such judgment, but should leave them to the remedies provided by law in its ordinary course.

The city of Santa Cruz did not receive any consideration whatever for the bonds in question (finding of fact No. 15, Rec., p. 46; testimony of Chas. E. Williams, treasurer, Rec., p. 409), and occupies as fair a position morally as do those who claim to be innocent purchasers for value.

Part II.

ANSWER TO PETITIONER'S BRIEF.

This case is clearly distinguishable from the cases of Hackett vs. Ottawa, Evansville vs. Dennett, and Gunnison County Commissioners vs. E. H. Rollins & Sons.

While we respectfully contend that this case is not of such extraordinary character as to call for review by this Court of the decision of the circuit court of appeals, but rather belongs to that great class of cases in which applications have been made for writs of certiorari on the ground of alleged error in the decisions of circuit courts of appeals, and which applications have been uniformly denied, and while it seems to us that the very purpose of the act creating circuit courts of appeals is partially defeated when the Supreme Court is required, on applications for writs of certiorari in ordinary actions at law, to consider extensive briefs and records, and in reality review such cases before determining whether such applications shall be granted or denied, yet, as counsel for petitioner insist with great earnestness that the circuit court of appeals in this case has committed error by failing to follow the decisions of this court in certain cases in which it is claimed the same question is involved, we will venture to briefly answer their argument.

The enabling act under which the bonds in question were issued required notice of election to be given by the mayor and common council (Stats. of California 1893, p. 59; Petitioner's Brief, p. 3). This notice was made jurisdictional by said act, which provided that such notice should recite the indebtedness to be refunded, together with all details of the proposed issue. This power could be exercised in one mode

only, to wit, by proceedings duly held at a meeting of the mayor and common council duly assembled as a board and spread upon the public records as a permanent record of a public character and open to the inspection of all. This results from the provisions of the enabling act of 1893, construed and read as it must be in connection with the charter of the city of Santa Cruz (Stats. of California 1875–1876, pp. 189–207).

There is no other conceivable way in which the notice of election specified in the statute could be given. The mayor and the council must give it and provide for it, and they must do it officially and in the manner provided by the charter, to wit, by ordinance, for in no other way could they act or proceed.

Jersey City *vs.* Central, etc., 40 N. J. Eq., 419.
People *vs.* Bailache, 52 Cal., 310.
Dey *vs.* Mayor, 19 N. J. Eq. P., 416.
Schumm *vs.* Mayor, 24 N. J. Eq. P., 153.
15 Am. & Eng. Encyp., pp. 1028, 1029.
Stevenson *vs.* Bay City, 26 Mich., 46.
Talcott *vs.* Noell, 78 N. W., 39, 40.
Lehman *vs.* San Diego, 83 Fed., 670.
Wasson *vs.* Saline, 73 Fed., 919.

The ordinances of the mayor and common council were public records, required to be kept "separately, in large, "well-bound, uniform, and suitable books" (Stats. California 1875–1876, sec. 40, p. 203); such an ordinance was so adopted, recorded, and kept as a public record (findings, Rec., pp. 34, 35, 36, 37, 63 to 75; opinion of circuit court, Rec., p. 100, sub. 4).

This brings the case at bar directly within the rule laid down in Lehman *vs.* San Diego, 83 Fed., 670; Dixon *vs.* Field, 111 U. S., 93, and Sutliff *vs.* Board, 147 U. S., 230, and takes it out of the category of Hackett *vs.* Ottawa, and other cases relied upon by petitioner.

Suppose the statutes of 1893 had been worded thus:

"The governing body of any city or town having an out-
"standing indebtedness, evidenced by bonds and warrants
"thereof, shall have power to pass an ordinance and enter
"the same in its ordinance record, which shall consist of
"large, well-bound, uniform and suitable books, kept at all
"times open for public inspection, calling, and prescrib-
"ing the form of notice of, an election to determine the
"question of refunding such indebtedness. Such notice
"shall recite and describe the particular bonds or war-
"rants to be refunded, together with the denomi-
"nation, character, time of payment, rate of interest,
"as well as all other details of the bonds proposed to be
"issued; and such recital and description shall fix the de-
"nominations of the refunding bonds at not less than $100
"and not more than $1,000, and the principal and interest
"as payable in coin or currency at the office of the treas-
"urer or some designated bank, such interest not exceeding
"6 per cent. per annum. If the requisite vote be in favor
"of refunding the indebtedness recited in said ordinance
"and notice, the bonds specified and described in said
"notice and ordinance shall be sold by said governing body
"to the highest bidder for not less than their face value."

If such had been the statute, the question before the court would be exactly the same.

Now, reading the statute with the charter, we have the statute supposed.

In other words, the legislative authority under which these bonds were issued is just what it would have been under the statute supposed, and we have a case legally identical with Lehman *vs.* San Diego. The acutest and most subtle metaphysics cannot draw a distinction between a statute authorizing the officials of a town to issue or sell *the bonds* specified, recited, or described in an ordinance already passed and recorded and a statute giving them power to issue or sell *the bonds* described, recited, or specified

in an ordinance thereafter to be passed and recorded and thereby authorized.

The unsubstantial and only distinction between Waite *vs.* Santa Cruz and Lehman *vs.* San Diego is that in the latter the governing body of the municipality, without previous authority, enacted an ordinance providing for the issuance of certain specified, described, and recited bonds in a specified mode and upon certain declared conditions, and the legislature afterward ratified, confirmed, and made valid the ordinance, while in the former the legislature, in advance, enacted that the governing body should have power to enact a similar ordinance, and, on its ratification by the electors, might issue those specified, described, and recited bonds in the mode and upon the conditions set forth, recorded, and made certain in and by the terms of the ordinance, provided, however, that the ordinance should show on its face that the bonds to be issued were refunding bonds issued to take up previous indebtedness evidenced by bonds or warrants *of the city*.

It is obviously immaterial whether the legislature ratifies the ordinance, as in Lehman *vs.* San Diego, or authorizes it in advance, as in this case. The ratification is the equivalent, and cannot be more than the equivalent, of previous authorization. The substantial points of resemblance, or, rather, of absolute legal identity, between the two cases cover the whole ground of debate. In neither was there given or conferred by the legislature any *general* power to issue bonds, coupled with conditions on the exercise of the power, the right to determine the existence of which conditions rested *in pais* or in parol and was committed to the decision of the governing body either expressly or by any implication.

It was frankly and properly conceded at the oral argument of this case before the circuit court of appeals that Lehman *vs.* San Diego was properly decided and was but a corollary of Dixon *vs.* Field. But why is this necessarily

so? Because the principle established in Dixon *vs.* Field, 111 U. S., 83, and Sutliff *vs.* Board, 147 U. S., 230, and kindred cases, is that if the statute *expressly* requires the facts constituting the condition precedent to the authority to issue the bonds to be made a matter of public record, open to the inspection of every one, *there can be no implication* that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

In Lehman *vs.* San Diego the statute did expressly require the facts to be made a public record simply because under the statute the facts were required to be contained in the proceedings of the board. The ordinance ratified gave the board authority to issue the bonds when and to whom such board *might by resolution direct*. The court said: "Under "the terms of the ordinance, no bond could be issued or de- "livered except upon a resolution of the board, *appearing* "*upon its minutes or the record of its proceedings*, thus furnish- "ing a most important safeguard against fraud and an "abuse of power. Every person dealing in the bonds is "bound, at his peril, to inquire whether they were issued in "the mode prescribed."

Lehman *vs.* San Diego, 83 Fed., 673.

That is, under the statutes and laws of California and by intendment and construction of law, a statutory requirement that a certain fact shall be embodied in a resolution or ordinance is an express requirement that it be made a matter of public record, open to the inspection of every one.

So, in Wesson *vs.* Saline, 73 Fed., 919, it is said: "Com- "mon councils, boards of commissioners, and like municipal "bodies can act only by order, ordinance, or resolution, as "every one is bound to know."

Consequently when a statute, as in the Lehman case, refers to an ordinance or resolution it means *ex vi termini*, something appearing on a public record, and by a perfect

parallelism the statute in this case (of 1893), by its reference to the notice of election, enacts and provides for a public record. The notice of election could be framed and devised only by the mayor and common council, and their acts must appear of record. This must be so on general principles, for in no other way can such bodies act at all; but in this case, as in the Lehman case, we need not rest the proposition on general principles alone. The statute of 1893, by the very act of directing certain action to be taken by the mayor and common council, incorporated into the statute the charter of Santa Cruz, prescribing in detail the mode and manner in which alone they could act, and consequently must be construed and read precisely and exactly as if it had said in so many words that the bonds could only be issued to refund an indebtedness of the city, *evidenced by bonds and outstanding warrants thereof, specifically recited and described in an ordinance spread on the records and minutes and transcribed and kept open for public inspection in large, legible, and well-bound books, etc.*

"The city clerk must keep separately, in large, well-bound, "uniform, and suitable books, an ordinance record, in which "shall be entered, in a good, round, legible hand, all the "ordinances passed by the common council, and approved "by the mayor of the city of Santa Cruz, and said record "shall be signed by the mayor and countersigned by the "city clerk of said city" (charter City of Santa Cruz, Stats. "of Cal. 1875–1876, p. 203, sec. 40).

In this case, even, if possible, more studiously and effectively than in the Lehman case, every feature of the legislation portrays the prevailing and controlling intention and purpose to interpose as a shield between the municipality and those dealing with its agents the important "safeguard against fraud and abuse of power" of a public and definite record, *expressly required by law*, and containing on its face the imperishable and unmistakable evidence of the juris-

diction of the officials, their compliance with their only letter and warrant of authority or their disregard of its limitations and conditions.

For these reasons and because there was no thought or wish to confer a general power to issue bonds and then to superadd conditions *in pais* determinable finally by the officials and concluded by their recitals as by the judgment of a court, the statute is mainly and in all substantials restricted and confined to and deals with matters not resting *in pais* and to be ascertained by perishable evidence in each given case, but with matters intrinsically and necessarily of record and ascertainable and determinable as well and as easily by intending dealers and purchasers as by the city officials.

There is no power given to refund the city indebtedness generally, but strictly and only that indebtedness the evidence of which must appear and can only appear by the written and recorded action of the council; and, then, carrying out the design, the notice of election is not, as usual, left to the will, discretion, or caprice of the officials, but must conform to the statute and distinctly specify the very writings and records evidencing the debt, and the very bonds in every detail which and which alone can be issued and sold.

In this particular case the point is made still clearer, if possible, by the course pursued. It must be admitted that on one proposition the law is settled—that is, that no recitals can control or estop the municipality in regard to matters appearing on the face of the bonds. In the Sutliff case (147 U. S., 230), the statute required the officials in submitting the question to the voters to enter of record an order specifying the amount required, etc., and the court said that it was clear that the plaintiff, though a purchaser for value and before maturity, was charged with the duty of examining the record provided for in the statute in order to ascertain whether the bonds increased the indebtedness beyond the limit, and "that the recitals in the bonds

"did not estop the county to prove by the records * * * "that the bonds have issued in violation" of the authority, etc., and that in such case there was no implication of authority in the officials to conclude the matter contrary to the facts so recorded.

Now, here, by a perfect parity of reasoning, the statute of 1893 required the officials in submitting the question to the voters to enter of record a statement specifying the indebtedness to be refunded, etc., and equally all purchasers were bound to examine that record in order to ascertain whether the specified indebtedness was such as could be refunded, etc., and no recitals could estop or conclude in that regard. But there has never been any doubt as to whether a statement made or fact appearing on the face of the bonds, whether required to be made by statute or not, prevents a purchaser from relying on recitals to the contrary of that fact if true; and so in the Sutliff case and other cases, some of which are there cited, it is held that when the amount of the bonds is stated on their face, that is sufficient to notify the purchaser. If, in this case, the notice of election had been copied into the bond in full, and so the bond had shown on its face its utter invalidity, it would not be, and is not contended there could be, any recovery. In such case, as, by necessary implication, is laid down in the Sutliff case, the purchaser is required to know the facts contained in the records required by law to be made, and also whatever facts are stated on the face of the bond; and if, by putting both together, he can ascertain or must know that the officials have exceeded their power, he cannot recover; and in Chaffee *vs.* Potter, 142 U. S., 363, it is expressly said: "If the face of one of the "bonds had disclosed that, as a matter of fact, the recital in "it, with respect to the constitutional limit, was false, of "course the county would not be bound by that recital, "and would not be estopped from pleading the invalidity "of the bonds in this particular."

So in Oxford *vs.* McClure, 4 Otto, 429, it is said: "These "bonds, therefore, carried on their face unmistakable evi- "dence that the forms of law under which they purported "to have been issued had not been complied with. * * * "If a purchaser may be, as he sometimes is, protected by "false recitals in municipal bonds, the municipality ought "to have the benefit of those that are true."

The bonds in suit show on their face two things that are true: First. That they are issued for the purpose of refunding the *bonded* indebtedness of the city of Santa Cruz. Second. That they are issued in pursuance of and in conformity with *ordinances* of the city and of a notice of election given as required by the statute, and therefore reciting the indebtedness refunded.

Taking, then, the statute and the face of the bond together, as he must, the purchaser is charged with knowledge that it was only bonds and not warrants that were attempted to be refunded; that the election was called by *ordinance*, and that the ordinance recited and specified the particular bonds, and was made a public record accessible to all, and kept in large, well-bound books, and also (though this is not essential here) that there were like public records, by reference to which he could ascertain whether the bonds recited were outstanding.

Another correspondence between this and the Lehman case is that in both the courts are to construe statutes of California and administer them in the light of the previously settled jurisprudence and course of decision in California. That California doctrine is "that the issuance of bonds is "not within the scope of the general and ordinary powers, "* * * and that such bonds can be legally issued only "by virtue of expressed authority of the legislature;" that if issued without any authority at all they are wholly void, and that "*the character of one void act of "public officers cannot be changed by a second void act of the "same officers declaring the first act to be valid.*" That even

statute *expressly* conferring the power to refund on the board or other officials, and not like that of 1893 giving no *express* power to do anything but *make up a record* of the action of the electors or some other body or tribunal, and couched in the same language, to wit, "having an *outstanding indebtedness evidenced by bonds or warrants thereof*," does not fall within "the line of judicial decisions in cases where the validity of "municipal bonds depended on the happening of some "precedent contingency of fact, and the question was, "whether the officers executing the bonds were vested with "the discretion or power to determine if the contingency "had happened. * * * But * * * the validity of "the bonds * * * did not depend upon any fact—any "matter *in pais*—there was nothing left to the discretion of "the officers, etc."

Sutro *vs.* Pettit, 74 Cal., 332.

And that "*every person dealing in bonds is bound, at his "peril, to inquire whether they were issued in the mode pre-"scribed; and as the mode is the measure of the power, the "bonds would be void in the hands of a holder for value, with-"out actual notice, if issued in any other mode.*"

McCoy *vs.* Briant, 53 Cal., 247.

Construing the statute of 1893 in the light of this doctrine, as was done with the statute in the Lehman case, how can the conclusion be reached that it was the intention of the legislature to commit to the city officials the power to decide whether the bonds refunded and recited in the notice of election were "outstanding bonds of the city," or to conclude by any recitals the question whether the limited and implied power so grudgingly conferred had been followed or exceeded or the mode prescribed disregarded? By adopting the language of the statute construed in Sutro *vs.* Pettit, it is elementary law that the construction was adopted with the language, and every variation between the statute con-

strued in Sutro *vs.* Pettit and the statute of 1893 but reinforces that construction.

It is well settled that the language of a statute is to be construed according to the judicial interpretation previously given to the same or similar language by the highest court of the same State prior to its enactment, and, following this well-settled rule for the construction of State statutes, as held in the recent case of O'Brien *vs.* Wheelock (C. C. A., 95 Fed., 883), Federal courts, in construing State statutes or constitutional provisions, though they are not bound to follow the construction given them by State courts after the rights in controversy in the suit accrued, will give effect to the principles of construction previously established by the State decisions, and will lean toward an agreement of views with the State courts.

It has been said in the cases in the Supreme Court of the United States decided before Dixon *vs.* Field established the correct, if not a new, rule (see opinion of Brewer, J., in Polton *vs.* Board, 33 Fed., 615) that if it be the law that certain facts must appear, the question is, To whom must they appear and when? Who is to decide? etc. But under the statute of 1893 these questions are easily and must be differently answered. By the express mandate of the statute, they must be decided when the notice of election is framed, and must then be made to appear on the face of the record. If the officials were to finally decide and embody their decision in the recitals, there was no necessity for reciting the facts in the notice of election; and even in the first instance, all they could decide was whether to take the decision of the electors on the question of refunding certain specified bonds and issuing other specified bonds. Then, as soon as the electors decided the question submitted, the record was made up and the decisions a finality. There is absolutely nothing in the statute from which can be implied any power to alter, vary, or depart from this decision. The whole *express* power given

by the statute had been exercised and exhausted. Nothing remained but the *implied* power to issue the exact and very bonds described in detail in the recorded decision and action of another and different tribunal—the electors—passing on a definite issue and question made up and presented to them. Unless this be so, it would follow that the statute gave an implied power to vary at will the details, amount, etc., of the *new* bonds, and to ruin the city by issuing them for any amount they saw fit. For this, we presume, no one would contend, and it is to us inconceivable that upon any construction of this statute the legislative intent was to commit to the city officials the power of deciding contrary to the facts plainly apparent on the face of the recorded notice of election what particular bonds were to be refunded, and by the self-same language in the self-same statute to deny them the power to decide in like contrariety what particular bonds could be issued for the very and only purpose of refunding the particular outstanding bonds specified.

We beg leave to repeat and emphasize the controlling facts and consideration peculiar to this case and distinguishing it from all those decided by the Supreme Court which are cited against respondent on this proposition, that by the statute (1893 Cal., p. 59) the whole of the first section down to the words "said bonds shall be sold by such city council, etc.," deals with the making of the record which is to evidence the decision and determination of the electors. From the rest of the section must be *implied* all the power conferred with reference to the issuing of bonds. And that *implication* is limited and restricted and confined to the sale and issuance of the very and identical bonds required by the preceding provisions to be described in minutest detail in the record already made up. The statute is express on this point. It says "said bonds" shall be sold, etc., and it must be construed as if it had said "the bonds so described in said notice may be issued, sold, etc." We cannot imagine that any legislator or proposer or framer

of an act intended to confer the power to make an unlimited issue of bonds, and to decide *de novo* and finally, without reference to any previous action, determination, or record, whether the facts giving the authority to make such unlimited issue existed, phrasing and wording the statute as this is expressed. The legislature is presumed to have known the existing state of the law, especially the previous decisions in California. If such dangerous and unfettered power had been contemplated, if it was the design to reverse the whole policy of the State and change the whole spirit of her jurisprudence, would the very language already construed not to confer this power have been adopted? Would such pains have been taken to cast aside and omit the express grant of power to issue bonds contained in the very statute they were amending? Would any proposal to amend this statute of 1893, when on its passage, by *expressing* the grant of power here sought to be fastened upon it by implication and construction have been even listened to or entertained for a moment? Imagine a legislature gravely providing for a decision by the voters of a question of issuing certain bonds to be specifically described and spread upon the public records, then, after giving authority to certain officials to sell those specific bonds and no others, inserting in the same section of the same act a proviso as follows:

"Providing the city officials shall have exclusive and "final jurisdiction and authority to determine and decide "what the public record already exacted and provided for "does recite and contain, and any recital in the bonds sold "by them shall be conclusive evidence of the contents of "said record and shall estop the city from showing that the "bonds issued and sold are not those described in said rec-"ord, no matter how great may be the excess of the issue."

In the statute in the Sutliff case there was a requirement of a like record to ours, exhibiting in detail the debts, etc., of the county. The Supreme Court, in language which has

never been recalled, said it was clear the purchaser was charged with the duty of examining the record, and that there could be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded by the officers issuing the bonds, and cite Dixon *vs.* Field to the effect that the requirement of such a record is necessarily followed by the consequence that such purchasers are bound by the record, notwithstanding any recitals in the bond.

It thus appears that the statute of 1893 was drawn so as to meet the views of the Supreme Court, and so as in the plainest way to exclude the implication of any power to vary the record by recitals or otherwise. The statute on its face and by its controlling and most important provisions expressly refers intending purchasers to a record *explicitly* required to contain the authentic and only evidence of the facts made a condition of the lawfulness of the whole proceeding. If this record fails to show the jurisdiction and lawful exercise of the authority attempted to be exercised, *a fortiori*, if it affirmatively shows the contrary, the purchaser is held to knowledge, and there can be no estoppel. The case stands just like those where the statute requires the facts to appear on the face of the bond, as in Barnett *vs.* Dennison, 145 U. S., 135. Here, as there, we can say, the city was merely agent, possessing only such powers as were expressly given *or implied because essential to carry into effect those expressly granted*, and that the provisions of the statute must be strictly pursued, and the purchaser is chargeable with notice of the requirements of the statute.

Now, here the only *express* power was to frame and make of record a notice showing the facts on its face, and then, if the electors so decided, there was at most an *implied* authority to sell the very bonds specified. This, we may concede, for the sake of argument only, could be implied, because essential to carry into effect the express

grant of power. But by what process of reasoning can it be said that the further power to vary the record by recital must be implied as *essential* to carrying out the express grant? The very making of any operative recitals must affirm on the face of the bonds that the record required by the statute was made, and would thus as fully and effectually as a compliance with the statute in Burnett *vs.* Dennison inform the purchaser of all the facts necessary to enable him to know for himself whether the bonds were issued in accordance with law. What possible difference can it make in principle whether this statute required the face of the bond to specify the bonds to be refunded and those to be issued, or required the notice of election to make the same facts a matter of record? In the latter case, to protect the purchaser, there must be a recital on the face of the bond that the notice of record did state the facts, and therefore, by intendment of law, the very face of the bond must, in the language of the supreme court, inform the purchaser that "there could be no implication that it was intended to "leave that matter to be determined and concluded, con- "trary to the facts so recorded, by the officers charged with "the duty of issuing the bonds."

Sutliff *vs.* Board, *supra.*

Here the requisite facts were not of a nature requiring examination and decision. They were like the assessed valuation of property, the consent or non-consent of the county in the Toledo case, the record of indebtedness in the Sutliff case, matters already determined and of record, extrinsic facts, themselves conferring the implied power to issue the bonds. The statute does not confer express power to issue bonds generally and then affix conditions precedent, resting *in pais* and requiring examination and decision, but leaves the whole question and grant of power to an implication arising upon an extrinsic record, express power to make which is conferred. The pur-

chaser cannot find in this statute any express power to issue bonds and infer that the conditions to its exercise have been fulfilled. He simply finds and *is told* by the statute in so many words that certain bonds described in a certain record, accessible to all, shall be sold, *provided* that record recites an outstanding bond or bonds of the city as that to be redeemed or refunded by the sale. He is not led to believe *that anything* is left to the decision of the officials, but put on his guard and made to know that by the very proposition to sell they affirm that their only power and authority is already fixed and determined by a public record setting forth all the facts.

One distinction here to be noticed is somewhat analogous to that beween a court or tribunal invested with *general* jurisdiction over a certain subject-matter, whose decisions within the scope of their jurisdiction import verity and cannot be collaterally attacked, and a jurisdiction which is special and can only arise or be exercised within certain defined limitations or upon the existence of certain extrinsic facts. In the latter case the tribunal can never give itself jurisdiction by simply claiming it or erroneously deciding that it has it.

This is well illustrated by the cases where a probate court seeks to administer upon the estate of one living. The statute gives jurisdiction over the estates of decedents. It has been often argued and nearly as often overruled that such a statute by implication gives power to decide finally the question of life or death.

If this is the rule, even in cases of superior courts of general jurisdiction and where the record shows the jurisdiction on its face, how can there be any question in case of a special tribunal with limited jurisdiction whose decision, on its face, shows the lack or abuse of power? If any such special tribunal was created by this statute of 1893 it consisted not of the outgoing officials, but of the old council *and* the electors, and their determination, as made patent and of

record by the notice of election, is conclusive against the validity of the whole proceeding. The very postulate that a record or judgment or other determination imports verity renders it *felo de se* if, on its face, it shows want of jurisdiction or power. For example, if a superior court of general jurisdiction, in granting probate, should recite the fact that *the alleged* decedent was still living.

So here the contention is that a special tribunal has been created and given power and jurisdiction to decide finally certain facts. That might be argued if the statute gave a *general* and express power to issue bonds and specified certain limitations, formalities, and conditions *in pais* as regulating the exercise of the power.

But where, as here, the only power and jurisdiction conferred is special and to sell certain specified bonds or to refund certain specified outstanding bonds, it is precisely like the grant of power to administer upon certain specified estates. The case, then, is like the cases of Sutro *vs.* Pettit and Lehman *vs.* San Diego. In such case, as said in Sutro *vs.* Pettit, the power granted being to refund "outstanding indebtedness evidenced by bonds or warrants," no question of the implication of authority to decide upon the fundamental, controlling, and jurisdictional facts, constituting the sole and special grant of power and jurisdiction, can arise, because "the validity of the bonds issued did not depend upon any "fact—any matter *in pais*—to be determined by the super- "visors. The power to issue the bonds and the limitation "of that power, depend wholly upon the language of the "act itself, and not upon any extrinsic contingency; there "was nothing left to the discretion of the officers."

And this very language of the statute, we repeat, was copied into the statute of 1893, thus carrying with it the construction already placed upon it. By all the authorities this has the same effect as if the statute of 1893 had *in terms* enacted into the statute all the language quoted from Sutro *vs.*

Pettit, and had thus expressly repudiated the implication of jurisdiction now sought to be fastened upon or injected into the statute by mere interpretation and construction.

"It is undoubtedly a question of local policy with each "State what shall be the extent and character of the powers "which its various political and municipal organizations "shall possess; and the settled decisions of its highest "courts on this subject will be regarded as authoritative by "the courts of the United States."

Claibourne *vs.* Brooks, 111 U. S., 400.

The contents of this notice of election (setting forth, among other things, the proposed refunding of $89,000, par value, of the mortgage bonds of a private water company, Findings Nos. 5 and 6, Rec. pp. 35–'7; Add. Fdg. No. 2, Rec., p. 65) have the same force and effect as the newspaper publication in McClure *vs.* Oxford, and the reasoning of the court applies here (4 Otto, 429). We submit it is shown that this case falls within Dixon *vs.* Field and the class to which it belongs and not within Chaffee *vs.* Potter and kindred cases, and that, moreover, the special terms and framework of our statute and the settled previous doctrine of the California courts take it out of all the cases cited by petitioner; also, that we have already sufficiently marked out the distinction between this case and Hackett *vs.* Ottawa and other Federal cases cited on the effect of recitals merely referring to ordinances.

In Hackett *vs.* Ottawa, 99 U. S., 86, there was a *general* power and jurisdiction conferred. The power was expressly given to borrow money and to issue bonds therefor. The court said: "No limitation is prescribed as to the amount "which may be borrowed. Nor is any express restriction "imposed as to the objects or purposes for which bonds "may be issued." There was no provision in the statute requiring the ordinance or the notice of election to contain any statement or recital as to the *purposes* for

which the bonds were to be issued or in any other way providing for any record of the facts made in obedience to express requirement of the statute. There was, therefore, nothing in the statute or on the face of the bonds or in the recitals directing purchasers to any record of the facts. They were not required to know that there was a record showing whether the bonds were issued in compliance with the statute. They were expressly assured that there was none showing any failure to comply. The court said the bonds would have been good *if they had made no reference to the ordinance*, etc.; but in our case these bonds would have unquestionably been invalid without a reference to or recital of the notice of election. At least, there must have been a recital of compliance with the statute, which could have been held *ex vi termini* to import and certify that there was a recorded notice of election setting forth all the essential and jurisdictional facts which we contend show the want of jurisdiction and flagrant departure from the statute in attempting to refund private debts. All the case decided was that the recitals could not be contradicted *as to the purpose for* which the bonds were issued, where there was no requirement that such purpose should appear on the face of the proceedings. If the statute in Hackett *vs.* Ottawa, instead of giving a general power and jurisdiction, had provided that an ordinance might be passed specifying the *purpose*, etc., and then that the bonds specified in the ordinance might be sold, etc., the case would have been something like this instead of being, as it is, its very antithesis, and under such a statute it must have been differently decided or overruled by the subsequent line of cases like Dixon *vs.* Field and the Sutliff case.

Risley *vs.* Village of Howell, 64 Fed., 453; 57 Fed., 544, is subject to the same explanation. It follows and is professedly based upon Hackett *vs.* Ottawa, from which it is said not to be distinguishable. In both cases all that is decided is that the mere circumstance that an

ordinance sets forth facts showing an unlawful *purpose*, when there was no statutory requirement that it should say anything on the subject, does not, when recited, impose on the purchaser the duty of examining something the statute gave him no warning would afford him any material or reliable information. By the statute and recitals in Risley *vs.* Howell the purchaser (*that court thought*) had a right to conclude that the bond had been properly issued and sold in strict accordance with law, and that with the purpose or act of the municipal officers in the subsequent disposition of the proceeds of the sale he had no concern. In other words, that he was not bound to see to the application of the purchase-money. The pertinent thing in this case of Risley *vs.* Howell is the reference to the Sutliff case, which shows how the case would have been decided had the Michigan statute resembled ours. The reference then would have read: "The case of Sutliff *vs.* Lake "Co., 149 U. S., 230, is a case of the same character as the "one before us. The bonds in suit were part of an issue "in excess and violation and utter disregard of the power "and jurisdiction prescribed by the statutes; and, as the "public records, to which the purchaser had access, disclosed "the lack of power, he is bound by the facts disclosed by "them, notwithstanding the recital in the bonds that they "were issued in conformity with the statute."

Another case cited on this point is Evansville *vs.* Dennett, 161 U. S., 434. Much that we have said applies to this case. In addition, we may say confidently that it was not intended to overrule or in any way or degree detract from Dixon *vs.* Field, the Sutliff, and like cases. If there had been any such thought, those cases would certainly have been at least alluded to, especially as they have been so often before and since mentioned and treated as embodying the settled doctrines of the Supreme Court. Evansville *vs.* Dennett is one of a class of cases in which a town, city, or other municipality has power to issue bonds

under a certain charter or statute, and also erroneously claims and asserts power to issue them under some other statute. In such cases it is held that the recitals that the bonds are issued under the statute which does not, in fact, give the power do not invalidate the bonds if there was some other power, charter, or statute under which they might properly have been issued. Thus in Evansville *vs.* Dennett there was power under the charter to issue the bonds on a petition of voters or tax-payers presented to the council. There was also a statute allowing the bonds to be issued pursuant to a vote previously had. The statute, in fact, as it turned out, was not operative, as having been repealed or for some other reason. The council, however, passed a resolution declaring that the bonds were issued under the statute and upon a vote, as the ordinance or resolution did not purport to show, and did not show, that any petition had been presented, and in fact none was presented. The question presented to the Supreme Court was whether a recital in the bonds that they were issued pursuant to an ordinance affected purchasers with notice of the terms of the ordinance and imposed upon them the duty of examining the ordinance. It was held that it did not, and that the purchasers had a right to act upon the supposition that the ordinance conformed to the charter, the only valid statute conferring power to issue the bonds, and that therefore the requisite petition had been presented.

Now, evidently this is simply following Hackett *vs.* Ottawa. There was nothing in the statute or in any of the statutes requiring the petition to state the jurisdictional facts and making such statement a matter of record, public or otherwise. Whether the petition was presented and whether it was a proper petition was left a matter *in pais*, and there was no requirement that any ordinance or resolution should in any way refer to it or make it a matter of record. The decision that the recital implied and assured the purchaser that the ordinance complied with the

statute, in the very nature of the case, could only be a decision that the ordinance contained everthing that the statute required it to contain. It certainly did not and could not decide that if the statute had expressly required that the ordinance should recite the petition, the recital would imply that it did not recite it. It may be that the recital implied and even proved that the petition had been presented. That would be simply because, as there was no express statutory requirement on the subject, the matter of the presentation of the petition was left *in pais* and to the determination of the officials issuing the bonds. The ordinance could fully conform to the statute and to every requirement of law and still be utterly silent as to the presentation of the petition. It was the Hackett case over again—simply that the gratuitous and unnecessary statement of a fact in an ordinance did not make the recital of that ordinance notice to the purchaser of the fact. The case must stand just as it would have stood if the ordinance had in all respects complied with the statute, and had not, without any requirement of the statute compelling it, stated any matters showing non-compliance with the law. In the case we are discussing, for instance, the ordinance stated erroneously and mistakenly that the proceedings were held under an invalid statute, and did not state a compliance with the charter; but there was no statutory requirement that the ordinance should say anything about either. The case is the same as if a council having perfect authority to issue bonds under a valid statute should foolishly and mistakenly and unnecessarily pass an ordinance reciting the provisions of an invalid statute, and that they were proceeding under that, and then issue the bonds, with proper recitals that they were issued in conformity to the law and also in pursuance of ordinances, the general recital would control, according to Evansville *vs.* Dennett.

The language of the court in Evansville *vs.* Dennett, 161 U. S., 443, 444, clearly shows that we have correctly interpreted that case, and plainly distinguishes it from ours and

such cases as Dixon *vs.* Field and the Sutliff case, which are not mentioned or referred to, as they certainly would have been had the statute of Indiana been anything like ours. This, we submit, is self evident unless some reasonable and sensible distinction can be drawn between a statutory requirement of a public record accessible to *all* and contained in legible, well-bound books kept by the city itself and any other public record like that of assessed valuation, registry of voters, etc., passed upon in the cases relied upon by petitioner, and even such a distinction would not reach the record in the Sutliff case; but there is no such distinction. *All the reasons* given apply equally to any "express and definite record of a public character." As appears from the language above referred to (161 U. S., 443, 444), there were two statutes—one invalid, providing for an election; the other, the charter, valid, but requiring a condition *in pais*, nowhere required to be recited or embodied in any record of any kind or nature, to wit, a petition of two-thirds of the resident freeholders. The court thought that the question whether there was a petition, whether it was signed by the requisite freeholders, etc., like other conditions *in pais*, was *intended by the legislature* to be left to the determination of the officials; that it was not necessary or required by the statute that such determination should appear of record or by ordinance or otherwise than by a recital in the bonds; that a mere recital of compliance with the charter concluded the question, and that, though there was an unnecessary and superfluous recital of an ordinance, the purchaser had a right to assume, even if he had seen the ordinance, that the election under the invalid statutes was a harmless surplusage, and that, as recited, both methods were pursued, and both the valid and invalid statutes complied with. The ordinance did *not* show, as does the notice of election in the case at bar, *affirmatively* a want of jurisdiction or abuse of power. It merely *failed* to show or make matter of record

a fact which no statute required the ordinance even to allude to, and which the statute did not contemplate the entering of upon any record. According to the views of the court, the bonds would have been equally good if the ordinance had been equally silent as to the petition and the election, and the recital had simply been a compliance with the charter, omitting all reference to the invalid statute and the ordinance. This was merely following the Hackett case. The holding that the recital imported that the ordinance was in conformity with the statute is entirely consistent with the doctrine of Dixon *vs.* Field, the Sutliff case, and like cases. In those cases an express recital that the records in question existed and fully conformed to the statute requiring and providing for them would not have varied or influenced the result except by furnishing an additional ground for the same decision. If the express recital in the case at bar of the notice of election imports its conformity with the statute prescribing its contents, it thereby imports that the record thereof absolutely furnished the exhaustive and conclusive proof of the power of the officials in regard to issuing the bonds and the sole test of the regularity of its exercise. It does not present a case like Evansville *vs.* Dennett, where, notwithstanding the ordinance recited fails to show the power and jurisdiction affirmatively, there was still another source of power not alluded to in the ordinance under which the proceedings might have been regular, and which did not require the facts calling it into existence and justifying the action taken to be specially or otherwise recited and spread on the records. What would have been the answers to the questions in Evansville *vs.* Dennett, even under the Indiana statute and the Indiana decisions and jurisprudence relied on and followed, if the ordinance had shown affirmatively a lack of power and jurisdiction under both the statute and the charter, we need not consider further. We think noth-

ing special need be said concerning the other decisions relied upon by petitioner, because we submit what we have already advanced applies to and covers them all. In so far as they agree and follow the decisions of the Supreme Court, it certainly does; and if there be any inconsistent therewith, which we think there are not, they are not authority here.

National Bank *vs.* Board, 62 Fed., 789, is fully in line with our contention and well illustrates the differences between this case and all those cited against that contention.

The law always has some reference to common sense and the actual transaction of affairs. No man in his senses would or could in good faith invest in bonds under a statute such as ours without first investigating the notice of election, ordinance, etc. No lawyer would attempt to pass the bonds without calling for these documents. He would, after the first glance at the statute, see that the only power was to sell the particular bonds detailed in the record authorized by law; and, in fact, we find the very first thing called for and examined here was this very record (Additional Finding No. 3, pp. 75–77; Testimony of C. D. Turney, Rec., p. 457; Testimony of F. H. Prince, Rec., pp. 460, 461).

The Mortgage Bonds of the City Water Company of Santa Cruz Included in the Refunding Proposition were not Bonds or Warrants of the City of Santa Cruz.

The judges of the circuit court and circuit court of appeals unanimously agreed that the bonds in question were issued for an invalid purpose, in that they were issued to refund in part the mortgage bonds of a private corporation. This was also conceded by petitioner in both the circuit court and circuit court of appeals, and it was not until counsel for petitioner filed their brief in the circuit court of appeals, on motion for rehearing, that the position was taken that

said mortgage bonds were bonds of the city of Santa Cruz. We do not consider this proposition debatable, particularly in view of the following provision of the constitution of the State of California:

"No county, city, town, township, board of education, or "school district shall incur any indebtedness or liability, in "any manner, or for any purpose, exceeding in any year "the income and revenue provided for it for such year "without the assent of two-thirds of the qualified electors "thereof, voting at an election to be held for that purpose, "nor unless, before or at the time of incurring such indebted- "ness, provision shall be made for the collection of an annual "tax sufficient to pay the interest on such indebtedness as "it falls due, and also provision to constitute a sinking fund "for the payment of the principal thereof on or before ma- "turity, which shall not exceed forty years from the time "of contracting the same. Any indebtedness or liability "incurred contrary to this provision shall be void."

Const. Cal., art. XI, sec. 18.

The mortgage bonds of the private corporation, the City Water Company of Santa Cruz, were not bonds of the city of Santa Cruz. They were not issued by said city; nor were they evidences, either actual or colorable, of indebtedness of said city.

There is no provision or authority of law, either constitutional or statutory, granting power to any city of California to assume the bonded indebtedness of a private corporation, and even if there were, such indebtedness could not be refunded under the enabling act of 1893, which expressly limits the refunding to indebtedness evidenced by bonds or warrants OF THE CITY.

It is well settled that in the absence of express authority, given either by the constitution or the statute, a municipality has no power to issue bonds, and that bonds issued by a

municipality without such statutory or constitutional authority are absolutely void.

Wills *vs.* Supervisors, 102 U. S., 625.
Claiborne County *vs.* Brooks, 111 U. S., 400.
Concord *vs.* Robinson, 121 U. S., 165.
Kelly *vs.* Milan, 127 U. S., 139.
Brenham *vs.* German-American Bank, 144 U. S., 173.
McCoy *vs.* Bryant, 53 Cal., 241.
Sutro *vs.* Pettit, 74 Cal., 336.

We respectfully submit that the petition for writ of certiorari herein should be denied.

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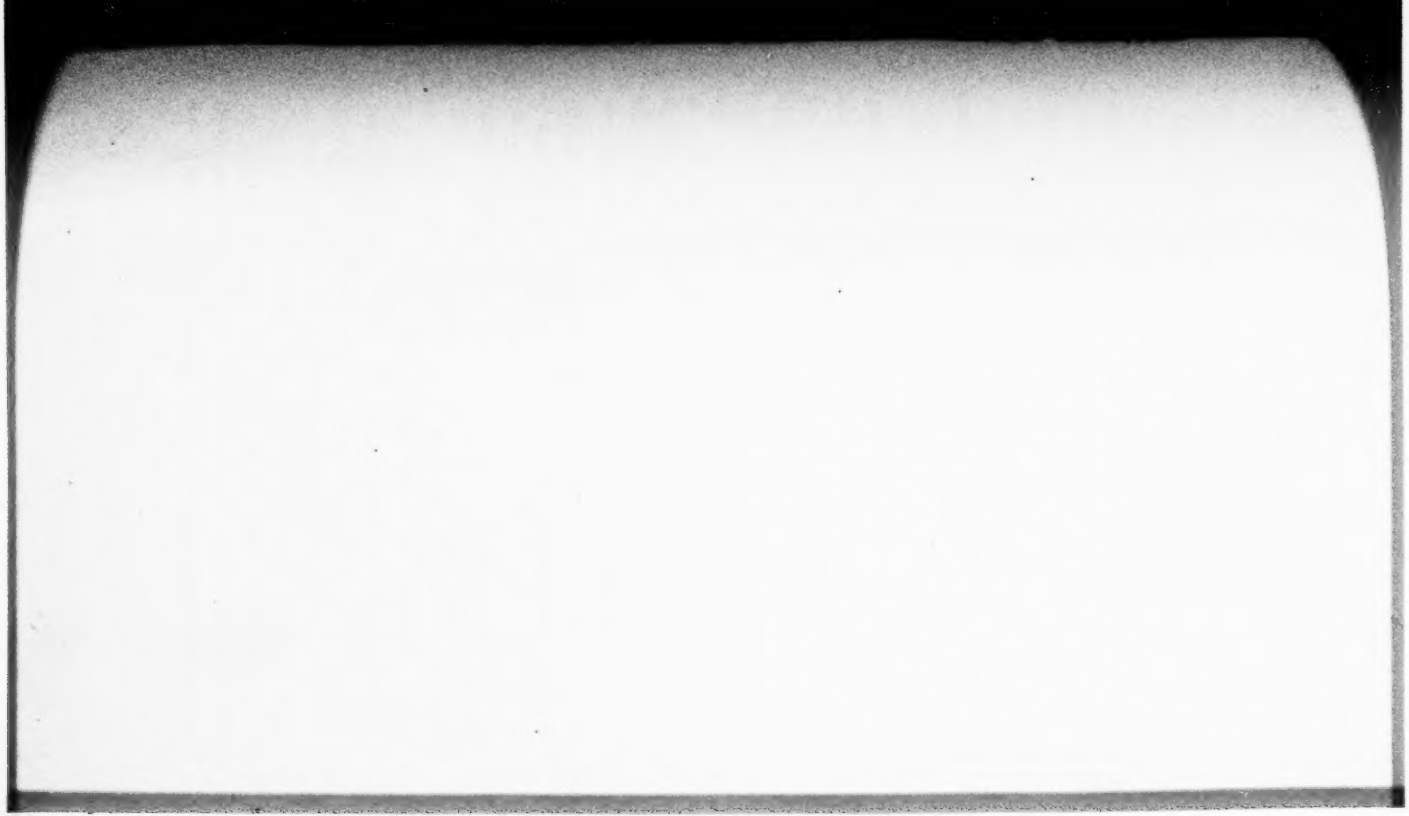

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No. 598.

Supreme Court of the United States

OCTOBER TERM, 1900.

ALBERT H. WAITE, PETITIONER,

vs.

CITY OF SANTA CRUZ, RESPONDENT.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

The action in the circuit court was brought by petitioner to recover from the city of Santa Cruz (respondent here) the sum of $23,100, on account of principal and interest alleged to be due on certain so-called refunding bonds of respondent, issued on or about the 16th day of April, 1894, with interest on the amount claimed to be due from the 15th day of April, 1895, and costs of suit.

Although the amount immediately involved in the ac-

tion is but $23,100, the validity of the entire refunding bond issue mentioned in the pleadings, and amounting to $360,000 with interest, is asserted by petitioner to be involved.

COMPLAINT.

In his original complaint petitioner set forth a separate cause of action upon each of the refunding bonds and coupons sued upon, but, upon the stipulation of the parties, after demurrer filed, petitioner filed an amended complaint stating his entire case as a single cause of action. Said amended complaint (Rec., pp. 3 to 7) alleges in substance:

That plaintiff (petitioner here) is a resident and citizen of the State of Massachusetts; that defendant (respondent here) is a municipal corporation of the fifth class; that on the 13th day of March, 1894, defendant had an outstanding indebtedness of $360,000 or thereabouts, evidenced by the bonds and warrants thereof, and that on said day the assessed value of all taxable real estate and personal property of said defendant city was $3,907,404; that on said day the mayor and common council, pursuant to an act of the legislature approved March 1, 1893, purporting to authorize incorporated cities and towns, other than cities of the first-class, to refund their bonded indebtedness and issue bonds therefor (Stats. 1893, p. 59), submitted to the qualified electors of defendant, at a special election called and held for that

purpose, in the manner in which other elections are held in such city, the question of refunding said outstanding indebtedness; that the notice of such election recited the indebtedness to be refunded; that at such election held on the 13th day of March, 1894, more than two-thirds of the qualified electors of defendant voted in favor of refunding the then outstanding indebtedness of defendant and assented to the execution and issuance of the refunding bonds sued upon; that on the 26th of March, 1894, the mayor and common council passed an ordinance refunding the said outstanding indebtedness; that all acts, conditions and things required by law to be done precedent to the issue of the bonds and coupons sued upon were properly done and approved in legal and due form as required by law; that on April 16, 1894, the defendant, by its mayor and city clerk, thereunto duly authorized, executed the bonds in question; that the bonds were of the character known as "serials," one-fortieth of the principal being payable annually, on the 15th day of April, together with interest on all bonds; that the bonds sued upon were due and payable on April 15, 1895, and that all the coupons sued upon in this action were due and payable on the same day; that before the delivery of the bonds and coupons defendant made provision for the collection of an annual tax sufficient to pay the interest on the same as it should fall due, and also provision to constitute a sinking fund for the payment of the principal thereof as it should fall due; that defendant, by its officers duly authorized, for value received, delivered the

entire refunding bond issue to one Walter Stanton, who afterwards, before their maturity, sold and delivered the bonds sued upon herein, and all of the coupons sued upon herein, to plaintiff; that plaintiff ever since has been, and now is, the lawful owner and the holder of said bonds and coupons, and presented the same for payment at the office of the city treasurer of defendant, but to pay the same or any thereof said treasurer wholly refused and refuses.

DEMURRER.

To this amended complaint defendant presented a demurrer upon the grounds: (1) That said amended complaint does not state facts sufficient to consittute a cause of action; (2) that the act under which the alleged bonds were issued was unconstitutional; and (3) that the complaint was uncertain in certain specified particulars (Rec., pp. 7, 8). The court overruled the demurrer.

ANSWER.

Defendant thereupon answered admitting, so far as a failure to deny is an admission, that plaintiff was a resident and citizen of the State of Massachusetts, and that defendant was at all times mentioned in the complaint a municipal corporation of the fifth class, organized and existing under the statute of the State of California approved March 1, 1866, and a statute supplemental to that of March 1, 1866, approved March 11, 1876.

The first issue joined is upon the allegation that on the 13th day of March, 1894, defendant had an outstanding indebtedness in the sum of $360,000, alleging that the outstanding indebtedness of defendant on said day did not exceed the sum of $270,000, but admits that on said day the assessed valuation of all taxable real and personal property in the said city of Santa Cruz was $3,907,404.

The next issue joined is upon the allegation that the mayor and common council of the city of Santa Cruz, on the 13th day of March, 1894, or at any other time, or at all, submitted to the qualified electors of defendant, at a special election, the question of refunding the outstanding indebtedness of defendant.

The next issue is upon the denial that any notice of such special election was ever given or published.

The next issue is raised by the denial that on the 13th day of March, 1894, or on any other date or day, two-thirds of the qualified electors of defendant voted in favor of refunding such or any indebtedness, or assented to the execution or issue of the bonds described in plaintiff's complaint.

The next issue is raised by the denial that on March 26, 1894, or at any other time, the mayor and common council of defendant adopted an ordinance providing for the refunding of its said indebtedness.

The next issue is raised by the denial that all acts, conditions and things, or any act, condition or thing, required by law to be done precedent to the issuance of the alleged bonds and coupons were or was done or approved.

The next issue is raised by the denial that on the 16th of April, 1894, or on any other day or date, the city of Santa Cruz, by its mayor and city clerk, or otherwise or at all, executed the refunding bonds described in the complaint. In connection with this denial it is admitted that on or about the 16th day of April, 1894, one William T. Jeter and one O. J. Lincoln, as mayor and city clerk of the city of Santa Cruz, did, but without right or authority, sign certain documents purporting to be refunding bonds, and which signatures were wholly unauthorized. In this connection, it has been admitted by stipulation that the signatures of William T. Jeter and O. J. Lincoln affixed to the bonds and coupons sued upon are genuine (Rec., p. 60), but it is not admitted that Mr. Jeter was at the time of signing the mayor of Santa Cruz, nor that O. J. Lincoln, as city clerk, was in any way authorized to sign.

The next issue is raised by the denial that the defendant, by its officers or otherwise, for value received or otherwise, delivered the refunding bonds, or any bonds of defendant, to one Walter Stanton, or to any person whomsoever. In connection with this denial, defendant alleges that on or about the date alleged by plaintiff the

documents alleged by plaintiff to be refunding bonds of the city of Santa Cruz, and all of them, were, by one Walter Stanton, stolen, taken, and carried away from the city clerk of Santa Cruz.

The next issue is raised by the denial that Walter Stanton, before the maturity of the alleged bonds and coupons sued upon, sold and delivered the same, or any of them, to plaintiff. In this connection the stipulation of the parties and the evidence adduced show that Walter Stanton did sell and hypothecate the documents in question to divers persons, who afterwards, and before the commencement of the action, transferred the same and all of them to plaintiff without any money consideration, but for collection merely (Stipulation, Rec., p. 60).

The next issue is raised by the denial of the allegation of indebtedness on the part of the defendant to plaintiff; but, as payment is not alleged, of course that issue depends upon the determination of the other preceding issues.

The next issue is raised by defendant's affirmative allegation that at the time of the alleged election on the question of refunding the outstanding indebtedness of defendant, defendant had no outstanding indebtedness, evidenced by either bonds or warrants thereof, which was either due or payable or subject to refunding.

The next issue is raised by the affirmative allegation of

defendant that, at the time of the alleged election on the question of refunding the outstanding indebtedness of defendant, evidenced by regularly issued and valid bonds and warrants, was only $39,000. That allegation was based upon the theory that the municipal bonds of the city of Santa Cruz dated January 15, 1889, then outstanding to the amount of $225,000, were invalid and void because issued and sold after the law authorizing their issuance and sale had been repealed.

The next issue is raised by the affirmative allegations showing the invalidity of the 89 so-called first mortgage bonds of the City Water Company of Santa Cruz, a private corporation, for the payment of which, in part, the so-called refunding bonds of the city of Santa Cruz were issued. This issue involves several allegations on pages 12, 13 and 14, in which allegations another issue is raised upon the assertion that in the ordinance submitting the question of refunding the outstanding indebtedness of the defendant, evidenced by the bonds and warrants thereof, these mortgage bonds of said private corporation, to the amount of $89,000, were included, and that in the ordinance providing for notice of the election upon the question of refunding the same indebtedness of said private corporation was included as part of the indebtedness of defendant to be refunded, and that, by said last mentioned ordinance, the question of refunding was so submitted to the people that it was impossible for any elector to vote for or against the refunding of the actual

indebtedness of defendant, or any indebtedness of defendant, without at the same time voting in the same way for or against refunding said $89,000 indebtedness of said private corporation, the City Water Company.

The next issue is raised by paragraphs 7, 8 and 9 of the third defense, upon the failure of the city clerk to publish the notice of election on the question of refunding the bonded indebtedness of the city of Santa Cruz, as required by City Ordinance No. 315 of the city of Santa Cruz, and the validity of said special election because of such failure of notice and the failure otherwise to hold and conduct the election according to law.

The next issue is raised upon the 11th paragraph of said third defense, on page 15, involving knowledge and notice on the part of the plaintiff at the time of purchasing the bonds of all the facts set forth in that third defense.

The next issue is raised upon the allegations of paragraphs 1 and 2 of the fourth defense, on page 15, that the bonds and coupons in question were stolen from the city clerk of the city of Santa Cruz on the 23rd day of April, 1894, by one Walter Stanton, and that plaintiff, at the time of his purchase of said bonds, had knowledge and notice that the bonds were so stolen, and that the city of Santa Cruz had never received any consideration therefor.

The next issue arises upon the allegations of para-

graphs 1, 2, 3, 4, 5, and 6 of the fifth defense, on pages 15 and 16 of defendant's answer, wherein it is alleged that the so-called refunding bonds, dated April 16, 1894, were invalid and void because, with the then outstanding bonded indebtedness of the city of Santa Cruz, they constituted an unlawful over-issue amounting to more than 15 per cent. of the assessed value of all taxable real and personal property in the city of Santa Cruz, and that plaintiff, at the time of his purchase of the bonds and coupons sued upon in this action, had full knowledge and notice of this over-issue.

The next issue is raised by the allegations of paragraphs 1, 2, 3, and 4 of the sixth defense, on pages 16 and 17 of defendant's answer, wherein it is alleged that the so-called refunding bonds were not sold by the city of Santa Cruz, nor by any officer or person representing the city, for not less than their face value in United States gold coin, as required by law, or for any value or sum or consideration whatever, to Walter Stanton, or to any other person; that said bonds were fraudulently taken by said Walter Stanton from the custody of the city clerk of the city of Santa Cruz on or about the 24th day of April, 1894, without any consideration whatever, and by said Walter Stanton appropriated to his own use; and that plaintiff, at the time of purchasing said bonds, had full knowledge and notice that said bonds had been fraudulently taken from the city of Santa Cruz, without consideration.

TRIAL AND DECISION.

The case was thereupon tried and submitted to the court for consideration and decision (a jury trial having been duly waived by written stipulation of the parties before the commencement of the trial), and was afterwards decided by the court in favor of the plaintiff (petitioner here) by its findings of fact filed on September 29, 1898, and its additional findings of fact filed December 1, 1898, *nunc pro tunc* as of September 29, 1898.

The special findings of the court, determining the issues raised by the pleadings, are, in substance, as follows:

1. That all of the bonds and coupons sued upon were assigned to plaintiff before the commencement of the action (Rec., p. 18).

2. That plaintiff did not pay any money consideration for the bonds, but that they were assigned to him for collection only (Rec., p. 18).

3. That the Northern Counties Investment Trust Company, Limited, one of the assignors of plaintiff, had notice at the time of purchasing the bonds that the same had been illegally issued by the city of Santa Cruz (Rec., pp. 18, 19).

4. That the defendant was, at all times, a municipal corporation of the fifth class organized as alleged in plaintiff's complaint (Rec., p. 19).

5. That on March 13th, 1894, defendant had an outstanding bonded indebtedness of $271,000; that the value of taxable real estate and personal property in said city was then $3,907,404; that on said date, at a special election held for that purpose, under certain ordinances previously enacted, the question of refunding certain outstanding indebtedness, evidenced by bonds and warrants of the city, and also including therewith the question of refunding 89 First Mortgage Bonds of the corporation known as the City Water Company of Santa Cruz, each of said mortgage bonds being of the face value of one thousand (1,000) dollars, and secured by a mortgage or deed of trust upon the City Water Works of Santa Cruz, purchased by the defendant city from said City Water Company of Santa Cruz prior to said 13th day of March, 1894 (Rec., p. 19).

6. That Ordinance No. 315 of defendant city, dated February 26th, 1894, provided for notice to be given of said election by the publication of a notice thereof, in the form prescribed by said ordinance, in the "Santa Cruz Surf" and "Santa Cruz Sentinel," for not less than ten days before the 13th day of March, 1894, and to be posted at each place of election for the same period; that said Ordinance No. 315 required the notice to state that the polls of such election would be open at sunrise in the morning of said day of election, and should close at 5 o'clock p. m. of said day. That the polls were opened and closed at the hours named in said ordinance; that more

than two-thirds of the qualified electors of defendant city voted in favor of refunding the then outstanding bonded indebtedness of defendant, and also of refunding the said 89 First Mortgage Bonds theretofore issued by the said corporation, the City Water Company of Santa Cruz (Rec., pp. 19, 20).

7. That the only notice given of said election was the publication of said ordinance in the papers named, for the length of time prescribed, and posting copies of the ordinance at each place of election for the same period (Rec., p. 20).

8. That, on March 26th, 1894, Ordinance 320 was duly enacted, providing for refunding the indebtedness specified in ordinances Nos. 314 and 315, and issuing bonds therefor; and setting forth in said finding the substance of said Ordinance No. 320, containing, among other things, the form of recital to be incorporated in each of the refunding bonds, the manner in which the bonds should be sold, and provisions for the annual tax to pay the interest and maturing installments of principal (Rec., pp. 20 to 22, inc.).

9. That, on April 11th, 1892, William T. Jeter was duly elected Mayor, and certain others were elected members of the common council; that they duly qualified for their respective offices within ten days after said election, and entered upon the duties of their offices. That the charter of the defendant city provides that the mayor

and common council of said city shall hold their offices for the term of two years, and until their successors are duly elected and qualified; that on the 9th day of April, 1894, Robert Effey was duly elected mayor to succeed Jeter, and duly qualified at such between 11o'clock a. m. and 2 o'clock p. m. of April 16, 1894; that certain other persons were, at the same time, elected members of the Common Council and qualified on said 16th day of April, 1894; that Jeter and the mebbers of the old common council continued to act as mayor and members of the common council until May 7th, 1894, without protest from any person, and held seven meetings of said Council between and including the 16th day of April, 1894, and the 7th day of May, 1894 (Rec., p. 22).

10. That on April 16, 1894, the acting mayor and council, having received no bids for the refunding bonds in question, accepted a proposition, previously made by Coffin and Stanton, to take all of said bonds upon condition that they should furnish satisfactory securities for the faithful performance of the agreement contained in the proposition, which proposition to sell the refunding bonds, in question, and apply the proceeds to the cancellation of outstanding bonds, is set forth in full in said finding (Rec., pp. 22, 23).

11. That, on April 23rd, 1894, the acting mayor and council, without protest or opposition, approved the bond of Coffin and Stanton, and ordered the said clerk to deliver the said refunding bonds to Coffin and Stan-

ton, and they were so delivered on April 24th, 1894 (Rec., p. 23).

12. That all of the assignors of plaintiff, other than the Northern Counties Investment Trust Company, Limited, and E. G. and E. Wallace, were bona fide purchasers of the bonds assigned by them to plaintiff; that E. G. & E. Wallace received certain advice and information concerning the bonds, notwithstanding which they had no actual knowledge or actual notice of the invalidity of the bonds, nor of any facts tending to impeach the truth of the recitals contained in the bonds (Rec., p. 24).

13. That all of the bonds and coupons, sued on, were in the form alleged in the complaint, and were duly attested, dated, and signed, but some of said bonds were signed by William T. Jeter on April 16, 1894, after the qualification of his successor in the office of mayor (Rec., p. 24).

14. That all of the bonds and coupons, sued on, matured April 15, 1895, and no part of the same has been paid (Rec., p. 24).

15. That Coffin and Stanton never complied with their agreement, upon which the said refunding bonds and coupons were delivered to them, and the city of Santa Cruz never received any consideration on account of the issuance of said bonds (Rec., p. 24).

The court afterwards, in connection with its order denying defendant's motion for a new trial, made its above-

mentoned additional findings of fact, in substance, as follows:

1. Setting forth, literally, Ordinance No. 314, submitting the question of refunding to the vote of the qualified electors of Santa Cruz (Rec., pp. 22 to 32, inc.).

2. Specifying more definitely the notice of election upon that question given by the mayor and common council; that the time fixed for closing the polls and the time at which the polls were closed, at said election, was one hour and fifteen minutes before sunset; that, while more than two-thirds of the qualified electors, voting at the special election, voted in favor of refunding, less than one-half of the qualified electors of said city voted at said election, and also sets forth in full said Ordinance No. 315, providing for the notice of election (Rec., pp. 32 to 39).

3. Amending original finding No. 12 by more fully specifying the notice and knowledge of E. G. & E. Wallace, concerning the procedure had upon the issuance of the refunding bonds in question, at the time of purchasing the bonds assigned by them to plaintiff, and finding that E. G. & E. Wallace, notwithstanding the knowledge acquired by and from persons upon whose opinions they relied in purchasing the bonds, were bona fide purchasers, and had no notice or knowledge sufficient to put them upon inquiry as to the validity of the bonds (Rec., pp. 39 to 41).

4. That a jury trial was duly waived by the stipulation, in writing, of the parties, and also upon the stipulation of the parties an order that the additional findings of fact should be filed *nunc pro tunc* as of the 29th day of September, 1898, the date of the filing of the original findings (Rec., p. 41).

Judgment was entered upon said decision on September 29, 1898, in favor of the defendant in error and against the plaintiff in error for the sum of $22,950, with interest thereon from April 15, 1895, to the date of the judgment, together with costs awarded to defendant in error, amounting to the sum of $685.50 (Rec., pp. 41, 42).

Within the time allowed by law and by the stipulations of the parties and orders of court in that behalf made, plaintiff in error herein presented to the court its proposed bill of exceptions, which was duly allowed, settled, and approved by the court on December 6, 1898 (Rec., pp. 60 to 258).

On December 28, 1898, respondent herein presented its petition for a writ of error, together with its assignments of error, which writ of error was by order of the circuit court of appeals duly allowed on said date; and the bond on writ of error, as required and fixed by order of the court, was duly given and filed on the 30th day of December, 1898. Whereupon the writ of error and citation were duly issued and served, and the answer of the judges of the circuit court of the United States of the ninth judicial circuit, with the record and

all proceedings, were duly certified to said court of appeals on said day.

Thereafter the cause was duly heard and considered by said circuit court of appeals, which (Gilbert, J., dissenting) reserved the judgment of the circuit court, with directions to the court below to "enter judgment " for the defendant (respondent here) on the findings." (Rec., pp. 309 to 316.) On reaching this decision the court of appeals expressly declared that it had not found it necessary "to decide any other point made and " argued by counsel, except that as to the jurisdiction " of the court." (Rec., p. 315.)

QUESTIONS INVOLVED.

Generally stated, the questions involved on the writ of error to the circuit court of appeals in this case, all of which specifically and in detail appear in the specification of errors following, are in substance as follows:

Plaintiff in error contends that the judgment rendered in the circuit court is erroneous and should be reversed, because:

1. The facts stated in the complaint of plaintiff in the court below do not constitute a cause of action at law against the defendant, and the circuit court of the United States has no jurisdiction of the case which is stated, namely, a cause of action to compel certain officers of the city of Santa Cruz to perform duties imposed

upon them by the laws of California. This question arose on defendant's demurrer to the complaint in the court below and upon assignments of error for insufficiency of the findings to support the judgment.

2. The act of the legislature of California known as the refunding act, under which the bonds in question were issued, is unconstitutional, because it is a local and special law relating to a subject concerning which the Constitution of California forbids the enactment of any special or local law; and, also, that said Act is unconstitutional because violative of the provision of the Federal Constitution, which forbids any State from passing laws impairing the obligations of contracts. This question arose also upon defendant's demurrer to the complaint in the court below and upon assignments of error for insufficiency of the findings to support the judgment, and that the judgment is against law.

4. The issuance of the bonds in question was not authorized by the so-called refunding act, nor by any law of the State of California. This question also arose on defendant's demurrer to the complaint in the court below, and upon assignments of error for insufficiency of the findings to support the judgment, and that the judgment is contrary to the findings and against law.

5. The bonds in question were not issued or sold in the manner prescribed and required by law, but in a manner and upon terms and conditions contrary to the law,

rendering them void. This question arose upon defendant's demurrer to the complaint in the court below and upon assignments of error for insufficiency of the findings to support the judgment, that the judgment is contrary to the findings and against law.

6. There is no allegation in the complaint that plaintiff was a bona fide purchaser of the bonds or coupons in question for value. This question arose upon defendant's demurrer to the complaint in the court below.

(All references to the complaint in the court below are to plaintiff's amended complaint therein, upon which issue was joined and the cause tried.)

7. The court erred in overruling several objections, hereinafter specified, made by defendant to the introduction of evidence tending to show that William T. Jeter, who was admittedly the mayor of the city of Santa Cruz until 12 o'clock noon on the 16th day of April, 1894, and for two years prior thereto continued to act as Mayor of the city of Santa Cruz after said 16th day of April, 1894, and after the election and qualification of his successor in office. This evidence was offered upon the trial for the purpose of showing that said William T. Jeter was de facto mayor of the city of Santa Cruz on the afternoon of April 16, 1894, between the hours of 3 o'clock p. m. and 7:30 o'clock p. m. of that day, during which last mentioned period said Jeter signed some of the bonds in question as mayor of the city of Santa Cruz, plaintiff

in error contending in this connection that the court erred in admitting any evidence tending to show that said Jeter was, by the performance, or pretended performance, of any official acts after the completion of the signing of the bonds in question, the de facto Mayor at the time of signing the bonds, namely: between the time of the qualification of his successor in office and the time at which he completed the signing of the bonds in question.

8. The court erred in refusing to make certain additional findings of fact requested by defendant (respondent in error here), and in refusing to amend certain findings of fact at the request of defendant, because the issues upon which such additional findings and amendments to the findings were requested were material, and such proposed additional findings and amendments to findings were supported by all of the evidence in the case relating to such issues, and that there was sufficient evidence to justify and support such additional findings and amendments to findings.

All of these questions arose upon the request of defendant for additional findings and for amendments to findings after judgment, and said alleged errors were duly assigned as errors and are hereinafter specified in detail.

9. The failure of the court to make findings of fact upon certain material issues, the determination of which was necessary to the rendition of a judgment in the

cause, and which the court failed in its special findings of fact to determine. These questions arose after judgment upon assignments of error for insufficiency of the findings to support the judgment, and that the judgment is contrary to the findings of fact and against law, and all of which are hereinafter specified in detail.

10. The findings of fact do not support the judgment, because it appears from the findings of fact that no notice of the election upon the question of refunding the outstanding indebtedness of the city of Santa Cruz and issuing the bonds in question therefor was given or published, as required by law and by the ordinance under which said election was called and held, and that there was, therefore, no election upon the question, and the entire bond issue is a matter of law void, and not merely invalid or voidable. This question arose after judgment upon assignments of error for insufficiency of the findings of fact to support the judgment; that the judgment is contrary to the findings of fact and is against law.

11. The findings of fact do not support the judgment in this: That it appears from said findings that the ordinance calling the alleged election on the question of refunding and issuing the bonds in question required the polls at such election to be closed at 5 o'clock in the afternoon of said day, one hour and fifteen minutes earlier than the time fixed by law (Stats. 1875-76, p.191, Sec. 5), which requires the polls to be kept open at such election

until sundown, which, as shown by the findings, was one hour and fifteen minutes after five o'clock p. m., the time at which the polls were required to be closed by said ordinance, and were actually closed on the day of said election; and it further appears from said findings of fact that while two-thirds of the electors of the city of Santa Cruz voting at said election voted in favor of refunding the indebtedness of said city and issuing bonds therefor, less than one-half of the qualified electors of the city of Santa Cruz had voted at said election at the time when the polls were so illegally closed.

12. The judgment is not supported by the findings of fact, because it appears from said findings that the bond issue of which the bonds and coupons in question constituted a portion was unlawfully issued in excess of the limitation fixed by law, namely, in excess of 15 per cent. upon the assessed value of the taxable real and personal property of the city of Santa Cruz.

13. The findings do not support the judgment, because it appears from said findings that a portion of the bond issue, of which the bonds and coupons in question constitute a portion, were not signed by the mayor of the city of Santa Cruz, but were signed as mayor by a person who was not at that time either de jure or de facto mayor of Santa Cruz, and it appears from said findings that it is impossible to distinguish the bonds so signed after said Jeter had ceased to be mayor of

Santa Cruz from the bonds that were lawfully signed by him while he was mayor of said city.

14. The findings of fact do not support the judgment, because it appears from said findings that the bond issue, of which the bonds and coupons in question constitute a portion, was not made for the purpose of refunding the outstanding indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof as prescribed and limited by the law under which said bonds purport to have been issued, but that said refunding bond issue was made in part, and to the extent of $89,000.00, to pay the mortgage bonds of a private corporation, contrary to the terms of the statute under which the bonds and coupons in question purport to have been issued, and said findings show that it is impossible to distinguish the bonds thus illegally issued for the purpose of refunding the mortgage bonds of said private corporation from the portion of said bond issue which was made for the purpose of refunding the municipal indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof as prescribed by law.

15. The findings do not support the judgment, because it appears from said findings that the bonds in question were not sold to the highest bidder for not less than their face value in gold coin, as required by the statute under which they purport to have been issued, but that they were, contrary to law and to the ordinances providing for the sale of said bonds, delivered to the firm

of Coffin & Stanton to sell the bonds and apply the proceeds to the redemption and refunding of certain outstanding obligations of the city of Santa Cruz and certain outstanding mortgage bonds of said private corporation, the City Water Company of Santa Cruz; and it further appears from said findings that said bonds were never sold as required by law, nor in the manner prescribed by law, and that the said Coffin & Stanton never complied with their agreement with the city of Santa Cruz; that the city of Santa Cruz never received any consideration whatever for said bonds; and that the condition imposed by law upon which alone the said bonds might be issued, sold, and delivered never happened and never existed; that the bonds and coupons in question were, therefore, illegally issued and delivered contrary to the terms of the law, and were therefore void.

16. The findings do not support the judgment in this: That it appears from said findings that the bonds in question, and all of the bonds in connection with which the coupons herein sued upon were issued, contain an unlawful provision making said bonds and the principal and interest thereof a lien upon the real and personal property of the City of Santa Cruz, contrary to the terms of the statute and of the Constitution of California, and rendering said entire bond issue unlawful, invalid and void.

17. The findings do not support the judgment in that it appears from said findings and from the judgment

rendered therein that the court below expressly adjudged the entire bond issue, of which the bonds and coupons in question constitute a portion, to have been unlawfully made and issued and to have been invalid at the time of issuance, because the same were issued in part to refund the mortgage bonds of a private corporation which did not constitute any part or portion of the indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof; and the court finds that the refunding of said mortgage bonds of said private corporation was a matter provided for in the ordinance of the common council of the city of Santa Cruz submitting to the electors of said city the question of refunding its indebtedness and issuing bonds therefor; that the refunding of said mortgage bonds was specified in said ordinance as one of the purposes of said election; said ordinance being a public record required by law to be kept by the city clerk of the city of Santa Cruz, "separately, in large, "well-bound, uniform and suitable books, an ordinance "record, in which shall be entered in good, round, legi- "ble hand all the ordinances passed by the common "council and approved by the mayor of the city of "Santa Cruz, and said records shall be signed by the "mayor and countersigned by the city clerk of said "city" (Stats. 1875-76, p. 203, Sec. 40); and said findings further show that in the ordinance providing for notice of election on the question of refunding the indebtedness of the city of Santa Cruz and issuing bonds therefor the refunding of said mortgage bonds of said private cor-

poration was specified as one of the purposes of said election, said last mentioned ordinance being also a public record of the city of Santa Cruz, required by law to be kept as a public record in the manner above specified; and it therefore appears from said findings that all purchasers of said refunding bonds and all the world had notice by said public records of the facts showing the illegality of said bonds, and that each and every bond and coupon issued under said ordinances, of which the bonds and coupons in question constitute a portion, was invalid and void because of said unlawful and unauthorized provision for refunding the mortgage bonds of said private corporation.

18. The findings do not support the judgment in this: That it appears from said findings that all purchasers of the bonds in question had actual and constructive notice by public records and otherwise of all of the facts showing and constituting the invalidity of said refunding bond issue and of all the bonds and coupons of said issue.

19. The findings do not support the judgment, because it appears from said findings that in the bonds in question, and in each and all thereof, and in each and all of the bonds from which the coupons in question were taken, there were recitals expressly referring to said ordinances of the city of Santa Cruz, thereby inviting inquiry as to such ordinances, an inspection of which would have disclosed the invalidity of all of said bonds

and coupons, because of the unlawful provision for refunding the indebtedness of said private corporation and of the unlawful provision for closing the polls at the election on the question of refunding one hour and fifteen minutes before the time fixed and prescribed by law for closing the polls at such election.

20. The findings do not support the judgment, because it appears from said findings that the entire bond issue was invalid; that such invalidity was shown by public records of the city of Santa Cruz required by law to be kept and open to public inspection, and that the recitals contained in the bonds and found by the court to have been relied on by certain purchasers of the bonds and coupons in question, are untrue and contradict said public records, and relate to matters not committed by law to the adjudication or determination of the persons or officers of the city of Santa Cruz executing the bonds and coupons in question and making such recitals.

21. The findings do not support the judgment, because it appears from said findings that the entire bond issue, of which the bonds and coupons in question constitute a portion, were invalid and void at the time of issuance, and it does not appear from said findings that the purchasers of said bonds and coupons, or any purchaser of any of the bonds or coupons in question, purchased said bonds upon the faith of any recitals or recital contained in any of said bonds, nor that any such purchasers or purchaser relied upon any recitals con-

tained in said bonds for any purpose whatever or at all; but, on the contrary, it appears from said findings that all of the purchasers of nearly all of said bonds and coupons made an independent investigation of the proceedings upon which said bonds and coupons were issued, and of the conditions under which said bonds and coupons were issued, and relied in purchasing said bonds upon such independent investigation and the knowledge and advice thereby obtained, and not upon the recitals, nor upon any of the recitals, in said bonds in purchasing said bonds and coupons.

22. The findings do not support the judgment, because it appears from said findings that said bonds were invalid and void when issued by the city of Santa Cruz; that the city of Santa Cruz did not sell said bonds and never received any consideration whatever therefor; that the plaintiff in this action paid no consideration whatever for said bonds or coupons, or any of them, but took the legal title thereto for the sole purpose of collecting the principal and interest thereof from the city of Santa Cruz for the benefit of his assignors; and it does not appear from said findings of fact what, if any, consideration was ever paid by plaintiff's immediate assignors, or by any prior purchasers of said bonds or coupons, therefor; nor does it appear from said findings of fact to what extent, if at all, the plaintiff, or any of his assignors, or any other person for whom plaintiff holds said bonds or coupons, or any of them, or any person interested in any

way in said bonds or coupons, has been injured through the fault of the city of Santa Cruz in permitting said invalid bonds and coupons to be issued and sold, or to be sold in the market as valid obligations of said city of Santa Cruz, and there is therefore nothing contained in the findings of fact upon which the judgment is based to establish or determine the measure of plaintiff's damage or of defendant's obligation upon the so-called bonds and coupons in question.

23. The findings do not support the judgment, because it apears from said findings that E. G. & E. Wallace, who assigned 150 of the bonds in question, with the coupons attached thereto, to the plaintiff herein for collection, had actual knowledge and notice through their agents and otherwise of all of the facts constituting and showing the invalidity of all the bonds and coupons in question; and said findings further show affirmatively that said E. G. & E. Wallace did not at all rely upon the recitals, nor upon any recital, contained in said bonds, but instituted an independent investigation concerning said bonds and coupons and the proceedings upon which the same were issued, and secured through their attorneys and agents and otherwise full information concerning all of the facts constituting and showing the validity of each and all of said bonds and coupons.

All of the above enumerated questions from 11 to 23 inclusive arose after judgment upon assignments of error for insufficiency of the findings to support the judgment;

that the judgment is contrary to the findings of fact herein and against law, and all of said questions are hereinafter in detail set forth in the specification of errors relied upon in the circuit court of appeals.

CALIFORNIA STATUTES INVOLVED.

The following are copies of the principal provisions of the constitution and statutes of California referred to and discussed in Part Third of this brief:

"Art. I. Sec. 22. The provisions of this constitution "are mandatory and prohibitory, unless by express "words they are declared to be otherwise" (Henning's Const. Cal., p. 47).

"Art. IV. Sec. 25. The Legislature shall not pass "local or special laws in any of the following enumer- "ated cases, that is to say:

"Tenth. For the assessment or collection of taxes.

"Eleventh. Providing for conducting elections, or "designating the places of voting, except on the organi- "zation of new counties.

"Nineteenth. Granting to any corporation, associa- "tion, or individual any special or exclusive right, privi- "lege or immunity.

"Thirty-third. In all other cases where a general law "can be made applicable (Henning's Const. Cal., pp. 71-72).

"Art. XI. Sec. 18. No county, city, town, township, "board of education, or school district shall incur any

"indebtedness or liability, in any manner, or for any "purpose, exceeding in any year the income and revenue "provided for it for such year without the assent of two- "thirds of the qualified electors thereof, voting at an "election to be held for that purpose, nor unless, before "or at the time of incurring such indebtedness, provision "shall be made for the collection of an annual tax suffi- "cient to pay the interest on such indebtedness as it falls "due, and also provision to constitute a sinking fund for "the payment of the principal thereof on or before ma- "turity, which shall not exceed forty years from the time "of contracting the same. Any indebtedness or liability "incurred contrary to this provision shall be void" (Rat- ification declared Dec. 30, 1892).

Henning's Const. Cal., pp. 171-172.

The Act to reincorporate the city of Santa Cruz (ap- proved March 11th, 1876, Stats. Cal. 1875-76, pp. 189- 207) provides:

"Sec. 2. The government of said city shall be vested "in a mayor; a common council, to consist of four mem- "bers," and other officers (p. 189).

"Sec. 3. On the second Monday in April, A. D. one "thousand eight hundred and seventy-six, and biennially "thereafter on the second Monday of April, a charter "election shall be held, at which the legally qualified "voters of said city shall elect the several respective "officers as hereinafter provided, viz: a mayor and four

"councilmen—one from each ward—who shall be elect-
"ors of the wards from which they are chosen, which
"mayor and common councilmen shall hold their office
"for two years, and until their successors are duly elect-
"ed and qualified" (pp. 189-190).

"Sec. 5. It shall be the duty of the mayor and com-
"mon council to call all city elections, to designate the
"time and place of holding the same, giving at least ten
"days' notice thereof. * * * The polls for all elec-
"tions shall be opened at nine o'clock a. m., and shall
"not be closed until sundown of the same day (p. 191).

"Sec. 7. The mayor and common council shall hold
"their regular meetings on the first Monday in each
"month. A majority of all the members elected shall be
"a quorum; and a less number may adjourn from time
"to time, and may compel the attendance of absent mem-
"bers" (p. 192).

"Sec. 9. The common council may adopt rules for
"its proceedings, shall judge of the qualifications of its
"members, keep a journal of its proceedings, compel the
"attendance of its members, and punish for disorderly
"conduct; * * * to pass such ordinances, resolu-
"tions, and by-laws for the regulation of the police
"and entire government of said city as may not be incon-
"sistent with the provisions of this charter, or with the
"constitution and laws of the State or of the United
"States; and any violation of any lawful order, regula-

"tion, or ordinance of the mayor and common council "of the city of Santa Cruz is hereby declared a misde- "meanor; and all prosecutions for the same may be in "the name of the people of the State of California" (pp. 192-193).

"Sec. 10. The common council shall not create, au- "dit, or allow, or permit to accrue, any debt or liability "above the actual revenue or available means in the "treasury that may be legally apportioned and appro- "priated for such purpose; nor shall any warrant be "drawn, or evidences of indebtedness be issued, unless "there shall be sufficient money in the treasury legally "applicable to meet the same, except as hereinafter pro- "vided" (p. 193).

"Sec. 14. The common council shall levy, annually, "a tax upon the real and personal property within the "city. Such levy shall be estimated upon the assess- "ment roll of the preceding year, and shall be for the fol- "lowing purposes, and none other: For the support of "the fire department of the city, a tax not exceeding ten "cents on each one hundred dollars; for the purpose of "sewerage and drainage of said city, a tax not exceeding "ten cents on each one hundred dollars; and for the gen- "eral fund, a tax not exceeding thirty cents on each one "hundred dollars. All licenses, unless otherwise ordered "by the common council, shall be apportioned to the "general fund, and all taxes and licenses herein author- "ized to be collected shall be collected in the same cur-

"rency as may be prescribed in reference to State and "county taxes" (pp. 194-5).

"Sec. 15. The common council shall constitute a "board of equalization, and shall, as soon as the assessor "shall have completed and handed in his assessment, "and after ten days' notice, hold their meeting to hear "and determine all complaints respecting the valuation "of property as fixed by the assessor, and shall have "power to modify and change such valuation in any way "they, or a majority of them, shall deem just and proper. "Said meetings may be held from time to time, as in said "notice specified, for the period of two weeks, and no "more" (p. 195).

"Sec. 40. * * * The city clerk must keep sepa- "rately, in large, well-bound, uniform, and suitable "books, an ordinance record, in which shall be entered, "in a good, round, legible hand, all the ordinances pass- "ed by the common council, and approved by the mayor "of the city of Santa Cruz; and said record shall be "signed by the mayor and countersigned by the city "clerk of said city (p. 203). * * * It shall be his "duty as city assessor, in each year, between the first "day of May and the first day of August, to make out a "true list of all the taxable property within the limits "of said city, which list, when so made out and certified "by him, shall be placed in the hands of the common "council for equalization. The mode of making out "such list and ascertaining the value of property shall

" be the same as prescribed by law for assessing State " and county taxes. He shall apportion the taxes upon " the assessment, and make out and deliver to the city " collector a tax list in the usual form, as soon as prac- " ticable after the common council, as a board of equal- " ization, have equalized the assessments; * * * At " the end of the fiscal year he shall make out a full and " detailed statement of the receipts and expenditures of " the city during said year, specifying the different " sources of revenue, and the amount received from each, " the several appropriations made by the common coun- " cil, and the object for which they were made, and the " amount of money expended under each, evidences of " indebtedness issued, and what portion thereof remains " outstanding, with the rate and amount of interest due " thereon, and the amount of cash on hand" (p. 204).

" Sec. 43. All city officers, whether elected by the peo- " ple or appointed by the mayor and common council, " shall, before entering on the duties of their offices, take " and subscribe the oath of office prescribed by law. All " of such officers, other than the mayor and members of " the common council, shall each, before entering upon " the duties of his office, give a bond, with sureties to be " approved by the mayor and common council, payable " to the city of Santa Cruz, in such sum as may be fixed " by ordinance, conditioned for the faithful performance " of the duties of his office as required by law, and the " ordinances and regulations passed and approved by

"the mayor and common council of the city of Santa "Cruz" (pp. 205-206).

The Act limiting municipal indebtedness (approved March 11th, 1891) provides:

"Sec. 5. No city, town, or municipal corporation "shall incur an indebtedness for public improvements "which shall, in the aggregate, exceed 15 per cent. of the "assessed value of all the taxable real estate and per- "sonal property of such city, town, or municipal corpor- "ation" (Stats., 1891, p. 84).

The refunding act (approved March 1, 1893, Stats. Cal. 1893, pp. 59-60) is as follows:

"CHAPTER XLVII.

"An act to amend an act entitled 'An act to authorize "'the common council, board of trustees, or other gov- "'erning body of any incorporated city or town, other "'than cities of the first class, to refund its indebtedness, "'issue bonds therefor, and provide for the payment of "'the same,' approved March 15, 1883.

"(Approved March 1, 1893).

"The People of the State of California, represented in "Senate and Assembly, do enact as follows:

"Section 1. That section one of the above entitled "Act is hereby amended to read as follows:

"Section 1. That whenever any incorporated city or "town, other than cities of the first class, in this State,

"has an outstanding indebtedness, evidenced by bonds "and warrants thereof, the common council, board of "trustees, or other governing body thereof, shall have "power to submit to the qualified electors of such city or "town, at an election to be held for that purpose, the "question of refunding such indebtedness. Said elec- "tion shall be called and held in the same manner in "which other elections are held in such city or town. "The notice of such election shall recite the indebtedness "to be refunded, together with the denomination, char- "acter, time of payment, rate of interest, as well as all "other details of the bonds proposed to be issued. Such "bonds shall be of the character known as 'serials,' one- "fortieth of the principal being payable each year, to- "gether with interest due on all sums unpaid. Said "bonds may be issued in denominations not to exceed "one thousand dollars, nor less than one hundred dol- "lars; principal and interest being payable in gold coin "or lawful money of the United States, and either at the "office of the treasurer of such city or town, or at a des- "ignated bank situated in the cities of San Francisco, "New York, Boston, or Chicago. Interest upon the "same shall not exceed six per cent. per annum, and "may be payable semi-annually. Said bonds shall be "sold in the manner provided by such city council, or "other governing body, to the highest bidder, for not less "than their face value, in the same character of money "in which they were payable. The proceeds of such sale "shall be placed in the treasury to the credit of the fund-

"ing fund, and shall be applied only for the purpose of "refunding the indebtedness for which they have been "issued. Said common council, or other governing "body, shall, at the time of fixing the general tax levy "for each year, and in the same manner for such tax "levy provided, levy and collect annually, each year, "sufficient money to pay one-fortieth part of the prin- "cipal of such bonds, and also the annual interest upon "the portion remaining unpaid.

"Sec. 2. That section two of said act be amended so "as to read as follows:

"Section 2. Whenever sufficient money is in the "funding fund, in the hands of the treasurer, to redeem "one or more of the outstanding bonds proposed to be "refunded, he shall publish once a week for two weeks in "some newspaper of general circulation published in "such city or town, if there be any, a notice to the effect "that he is prepared to pay such bond or bonds (giving "the number thereof), and if the same are not presented "for redemption within thirty days after the first publi- "cation of such notice, the interest on such bonds will "cease. He shall, at the same time, deposit in the post- "office a copy of such notice, inclosed in a sealed enve- "lope, with the postage paid thereon, addressed to the "owner or owners of such bond or bonds, at the post- "office address of such owner or owners, as shown by the "record thereof kept in the treasurer's office. If such "bond or bonds are not presented within the time speci- "fied in such notice, the interest thereon shall then cease,

"and the amount due be set aside for the payment of "the same, whenever presented. All redemption of bonds "shall be made according to the priority in the order of "their issuance, beginning at the first number. When- "ever such outstanding bonds are surrendered and paid, "the treasurer shall proceed to cancel the same by in- "dorsing on the face thereof the amount for which they "are received, the word 'canceled,' and the date of can- "cellation. He shall also keep a record of such bonds "so redeemed, and shall make a report of the same to the "common council, or other governing body of such city "or town, at least once a month, accompanying the same "therewith by the bonds which have been taken up and "canceled.

"Sec. 3. That section three of said act be amended "so as to read as follows:

"Section 3. All moneys which shall remain in said "funding fund after all outstanding bonds as were pro- "posed to be refunded have been taken up and canceled, "shall be paid into the general fund of such city or town, "and become a part thereof.

"Sec. 4. This act shall take effect and be in force "immediately after its passage."

PART SECOND.

SPECIFICATIONS OF ERRORS RELIED UPON, IN THE CIRCUIT COURT OF APPEALS.

The following is a specification of the errors relied upon in the United States circuit court of appeals and intended to be urged upon the hearing of this cause:

I.

That the circuit court erred in overruling defendant's demurrer to the amended complaint of plaintiff in this action (Rec., pp. 7, 8, 9) for the following reasons, to wit:

1. Because it appears upon the face of said amended complaint that plaintiff (defendant in error) has mistaken his remedy, for the reason that the bonds sued upon in this action, and the interest thereon, were to be paid only out of a special fund to be created for that purpose, in the manner and form prescribed by the statute and under and by virtue of which the refunding bonds are alleged to have been issued, and in accordance with the provision "for the collection of an annual tax suffi-"cient to pay the interest on the same (the bonds) as it "falls due, and also the provision to constitute a sinking "fund for the payment of the principal thereof as it "should fall due," alleged to have been made by the de-

fendant in accordance with the terms of said bonds, and of the law under which they were issued, before the delivery of said bonds and coupons as alleged in the amended complaint, and there is no allegation, either that the special tax prescribed by law was or was not levied, and there is no allegation either that there is money in said special fund applicable to the payment of either the principal or the interest of said bonds, or any of them, nor that there is no money in such special fund. It appears upon the face of said amended complaint that plaintiff (defendant in error) is limited to the special fund provided by law and by the ordinance of the defendant for the payment of his bonds and coupons, and that he has no right to enforce the payment of either the bonds or coupons, or any of them, out of the general assets of the city of Santa Cruz.

2. Because the act of the legislature of the State of California entitled "An Act to amend an Act entitled "'An Act authorizing the common council, board of "'trustees, or other governing body of any incorporated "'city or town, other than cities of the first class, to re-"'fund its indebtedness, issue bonds therefor, and to pro-"'vide for the payment of the same (approved March 15, "'1883),' approved March 1, 1893," by authority of which, and under the terms of which, it is alleged in said amended complaint that the bonds sued upon in this action were issued, is in conflict with the Constitution of the State of California, in that said act is a local and

special law relating to a subject concerning which the constitution of the State of California requires all laws to be general.

3. Because it appears upon the face of said amended complaint that the bond issue in question was illegally made, because in excess of the amount of bonded indebtedness which the city of Santa Cruz could contract under the laws of the State of California in force at the time when said bonds were issued.

4. Because the said refunding act under which said bonds are alleged to have been issued did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives power to the governing body of any city within the classes selected to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its outstanding indebtedness, evidenced by bonds and warrants thereof, and specifies the manner in which said election shall be called and held and the form of notice to be given of such election, there is no provision in the act or in any other act or law of the State of California, as to what shall be the result of a vote favorable to refunding at such election, and that said refunding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding, the city or its governing body, or its executive head, or any other officer or agent, shall have power to make or issue refunding bonds.

5. Because it appears upon the face of said amended complaint that the said refunding act under which said bonds are alleged to have been issued is unconstitutional, as violative of the provisions of the Constitution of the United States, which forbids any State to pass any law impairing the obligations of a contract.

6. Because said amended complaint does not show that the bonds sued upon were sold by the city of Santa Cruz for their face value in gold coin, as required by said refunding act of 1893.

7. Because there is no allegation in said complaint that the plaintiff was a *bona fide* purchaser, nor that the plaintiff paid any consideration for the bonds or coupons purchased, nor are any facts alleged showing that at the time of any purchase by the plaintiff he had not notice of the validity of said bonds and coupons, nor that he had not notice of facts sufficient to put him upon inquiry as to such invalidity.

8. Because it appears upon the face of said amended complaint that the bonds sued upon, by the terms thereof, are payable in gold coin of the United States, violative of the provision of said Refunding Act of 1893, under which said bonds were issued, which requires that bonds issued under the terms and authority thereof shall be payable in gold coin or lawful money of the United States.

9. Because said complaint does not state facts sufficient to constitute a cause of action.

10. Because it appears on the face of said complaint that the plaintiff was not a bona fide purchaser without notice, in that it is alleged in the complaint that the notice of election therein mentioned was required by the statute of 1893 to, and did, specify the particulars of the indebtedness to be refunded and that the plaintiff had notice of and was bound to take notice of all the terms and conditions of said statute and therefore had notice to put him upon inquiry as to the invalidity of said bonds, as being an attempt to refund what was not such an indebtedness as was allowed by the statute to be refunded; and such inquiry, if reasonably pursued, would have fully informed plaintiff of the invalidity of said proceedings, the same appearing by matter of record provided for by the statute, to wit: The specification aforesaid required to be inserted in said notice of election.

(11). Because it appears on the face of said amended complaint that plaintiff could not rely upon the recitals in said bonds as concluding the questions of the invalidity thereof or as estopping the city from alleging to the contrary in said recitals, and that the matters and facts constituting the validity of said bonds were not by any law committed to the decision of the officials of said city, and the question as to whether the indebtedness attempted to be refunded was such an indebtedness as

could be so refunded under the said statute of 1893 was not one committed to the decision of the officials of the city of Santa Cruz or which could be concluded by any recitals by them made, but was to be determined by an inspection of the record evidence thereof provided for by the statute, and because the said city officials had no power finally or conclusively to determine the question whether the indebtedness proposed to be refunded was such an indebtedness as could be refunded under the said statute (Rec., pp. 3 to 8).

(Errors Assigned, Rec., pp. 259, 260-1-2.)

II.

That the court erred in admitting in evidence a resolution incorporated in a purported record of a meeting of the city council of the city of Santa Cruz, held on the 23rd day of April, 1894 (Rec., p. 148), ordering and directing that the bonds here in question be delivered to Messrs. Coffin & Stanton, the minutes of said meeting showing that William T. Jeter acted as mayor, and members of the old city council, whose successors were elected on the 9th day of April, 1894, and qualified between the said 9th day of April and the 16th day of April, 1894 (p. 203), acted as members of the city council (p. 148).

Defendant objected to said resolution as irrelevant, immaterial and incompetent, and now specifies, in support of said objection, that the resolution appeared from

the face of the minutes to have been adopted by persons who were not legally entitled to the offices the functions of which they exercised at the time. The court overruled the objection; to which ruling defendant then and there duly excepted. The resolution was thereupon admitted in evidence (p. 148), to the prejudice of defendant.

(Error Assigned, Rec., pp. 262-3.)

III.

That the court erred in refusing to make the following additional finding of fact requested by defendant:

"Amend Finding No. 12 by inserting after the words "'E. G. & E. Wallace,' in line 27 on page 10, the follow-"ing: 'Before purchasing said bonds, said firm of E. G. "'& E. Wallace asked for the opinion of some attorney "'in Boston, known to the firm, upon the question of the "'validity of the bonds, and, after consultation, it was "'decided to refer the question to Mr. M. F. Dickinson, "'Jr., an attorney of the city of Boston. Prince & Co. "'thereupon employed and consulted said Dickinson in "'regard to the validity of the bonds in question, and "'submitted to him copies of said ordinances numbered "'314, 315, and 320 of the city of Santa Cruz, after ex-"'amining which said Dickinson rendered a written "'opinion in favor of the validity of the bonds, which "'opinion was furnished to and received by said firm "'of E. G. & E. Wallace prior to their purchase of the "'bonds in question. But said Dickinson did not com-

" 'municate his knowledge of said ordinances, or any of " 'them, to said E. G. & E. Wallace.' As the line and " page of the original finding hereinabove specified do " not correspond in the record with the line and page of " the original findings of fact on file, plaintiff in error " states more specifically that the point in said finding " No. 12 at which the amendment requested as above " stated was to be inserted was after the following words " in said finding: 'The said H. F. Prince & Co. did not " 'communicate their said knowledge to E. G. & E. Wal- " 'lace' " (Rec., p. 24).

The court erred in refusing to make said additional finding for the reason that the same was in strict accordance with and fully supported by all the evidence and testimony on that subject, and there was no evidence or testimony to the contrary, and the said additional finding was required by the uncontradicted and undisputed evidence, to wit: the evidence of Sumner Wallace and the evidence of Frederick H. Prince, as follows:

Sumner Wallace testified as follows (pp. 100-1-2, of the record): "I think F. H. Prince & Co. made no state- " ment to me in regard to the financial condition of the " city or in regard to the validity of the bonds. They " submitted the opinion of Mr. Goldsby, of Santa Cruz, " Cal., and Mr. Gleason, of New York. This was not sat- " isfactory to us, and we asked for the opinion of some " attorney in Boston, and decided to refer it to Mr. M. F. " Dickinson, Jr., attorney for the American Loan &

"Trust Co., and his opinion was obtained, which I have "here. Those opinions being favorable, I purchased the "bonds. I have the opinions of the attorneys upon "which we relied in making the purchase. * * * I "never saw Mr. Dickinson. Mr. Prince brought his "opinion to us. All those opinions were procured by "Prince & Co. or by Coffin & Stanton. The Goldsby and "Gleason opinions were submitted to us without con-"sultation with us, but the Dickinson opinion was ob-"tained, by agreement, after I had said to Prince & Com-"pany that I wanted an opinion from Dickinson."

Frederick H. Prince testified (pp. 245-6-7 of the record): "I suggested to Messrs. Wallace that they buy "the Santa Cruz bonds, and they authorized me to buy "them. I stated to them that Coffin & Stanton in New "York, I thought, were hard up for money, it being then "in the middle of one of our panics, and I thought by ad-"vancing this amount of money he could get them to "buy this manufacturing stock in exchange. Messrs. "E. G. & E. Wallace had spoken to me previously about "selling that Page Belting stock, before I broached this "purchase of the Santa Cruz bonds, and they had told "me I could sell the belting stock if I could. * * * I "don't know whether the Messrs. Wallace made any in-"quiry as to the legality or validity of the Santa Cruz "bonds. We employed attorneys to make investigation "and to give an opinion as to the legality of the bonds. "We employed Mr. M. F. Dickinson. Story & Thorn-"dyke were our private counsel, and they were called

"upon by us to investigate into the legality of these "bonds and to give an opinion. During the long nego- "tiations between July and September, the Messrs. Wal- "lace asked whether we had called upon any attorneys "for their opinion as to the legality of these bonds. It "is always customary in a sale of bonds to give a law- "yer's opinion that the bonds have been properly exam- "ined, and in this case I think there were three opin- "ions. Messrs. Wallace asked us what opinion we had "in regard to the bonds being properly issued, and we "gave them Mr. Dickinson's opinion, and also the opin- "ion of some lawyer in New York, whose name I do not "recollect, and also the lawyer out in California. Coffin "& Stanton sent us all the papers relating to the issue "of these Santa Cruz refunding bonds, and we submit- "ted them to Mr. Dickinson, whom we consulted before "we consulted Story & Thorndyke. * * * In this "case, as I remember it, there was a very full set of "papers, votes, and so forth. I could not swear posi- "tively, but it is my impression that all the ordinances "of the city of Santa Cruz, the advertisements, and the "contract with Coffin & Stanton, were submitted. They "were very careful to send all the papers. That is my "best memory. * * * It is customary in selling "bonds to give a Boston lawyer's opinion in reference "to the same. The opinion of the California lawyer and "the New York lawyer were sent to me with the papers "by Coffin & Stanton. I think Dickinson gave us his "opinion, and then we called on Story & Thorndyke, our

"private lawyers, for their opinion. After we originaliy "got the papers from Coffin & Stanton in connection "with these Santa Cruz bonds, Dickinson asked for cer- "tain papers, which were sent for to Coffin & Stanton, "and they sent them to us. That was subsquently to the "first papers sent us and before Dickinson gave his "opinion. As I remember it, he asked for some papers, "that we sent for them, and they were given to him. "Coffin & Stanton supplied us with all the necessary "sworn statements of all kinds and descriptions. * *"

The said witness, Frederick H. Prince, further testified (pp. 248-9 of the record) that the firm of Frederick H. Prince & Co. had sent the following letter to Messrs. E. G. & E. Wallace before the purchase by said Messrs. E. G. & E. Wallace of the bonds in question:

"Boston, August 31, 1894.

"Messrs. E. G. & E. Wallace, Rochester, N. H.—

"Gentlemen: As instructed by you, we have negoti- "ated with Messrs. Coffin & Stanton to sell to you the "$360,000 city of Santa Cruz, Cal., 5 per cent. bonds, "dated April 16, 1894, at par and interest, they agreeing "to accept in payment therefor 350 shares of Page Belt- "ing Co. preferred stock at par; 520 shares of Page Belt- "ing Co. common stock at 85, and the balance in cash. "The legality of this issue of bonds has been passed upon "by Mr. M. F. Dickinson, Jr., of the law firm of Messrs. "Hyde, Dickinson & Howe, the attorneys of the Ameri- "can Loan & Trust Co., and we enclose herewith his

"written opinion, which kindly return to us for our "files. Please notify us when it will be agreeable to "you to carry through the transaction. Our charge to "you for services in this matter will be $2,500, as already "arranged with Mr. Sumner Wallace.

"Very truly yours, F. H. PRINCE & CO."

(Error Assigned, Rec., pp. 269, 270-1.)

IV.

That the court erred in refusing to make the following additional finding of fact requested by said defendant:

"Amend Finding No. 15 by inserting, after the words "'Coffin & Stanton,' in the first line of said finding, the "words 'immediately after receiving said bonds, sold the "'same, and each and all thereof, but.'"

The court erred in refusing to make said additional finding of fact because the uncontradicted evidence shows that Coffin & Stanton, immediately after receiving the bonds in question from the city clerk of the city of Santa Cruz, sold and hypothecated the same, and each and all thereof, for the sole benefit of said firm of Coffin & Stanton (pp. 90-1, 145-6).

(Error Assigned, Rec., pp. 271-2.)

V.

That the court erred in refusing to make the following additional finding of fact requested by said defendant:

"That the bonds and coupons mentioned and described "in plaintiff's complaint, and each and all of them, were "fraudulently taken by Walter Stanton from the cus- "tody of the city clerk of the city of Santa Cruz on or "about the 24th day of April, 1894, and then and there "by him, the said Walter Stanton, appropriated to his "own use."

The court erred in refusing to make said additional finding of fact, because it appears from the evidence that Walter Stanton procured said bonds to be issued by the city of Santa Cruz, and delivered to him by the city clerk of the city of Santa Cruz, with the fraudulent intent and purpose of appropriating said bonds, and each and all thereof, to his own use and to the use of the firm of Coffin & Stanton, and that immediately after securing possession of said bonds he did appropriate the same, and each and all thereof, to his own use and to the use of his said firm of Coffin & Stanton, and there is no evidence contradictory of or inconsistent with said evidence (pp. 90-1, 148-9, 205-7, 203-4).

(Error Assigned, Rec., p. 272.)

VI.

That the court erred in refusing to make the following additional finding of fact requested by said defendant:

"That each and all of said bonds and coupons mentioned and set forth in plaintiff's complaint were, on or about the 24th day of April, 1894, willfully, unlawfully, and feloniously stolen, taken, and carried away from the possession of the clerk of said city of Santa Cruz by Walter Stanton, a member of said firm of Coffin & Stanton."

The court erred in refusing to make said additional finding of fact, because the evidence shows that Walter Stanton did, on or about the 24th day of April, 1894, obtain possession of the bonds and coupons mentioned and set forth in plaintiff's complaint upon false and fraudulent pretenses and representations, with intent at the time of taking the same from the possession of the city clerk of the city of Santa Cruz, to feloniously steal said bonds and coupons, and appropriate the same to his own use and to the use of the said firm of Coffin & Stanton. And there is no evidence contradictory of or inconsistent with said evidence (pp. 90-1, 145-6, 148-9, 205-7, 203-4).

(Error Assigned, Rec., pp. 272-3.)

VII.

That the court erred in refusing to make the follow-

ing additional finding of fact requested by said defendant:

"That all purchasers and holders of the bonds and "coupons mentioned and set forth in plaintiff's com- "plaint had full notice and knowledge at the time of pur- "chasing the same that said bonds and coupons, and "each of them and all of them, constituted part of an "indebtedness sought to be contracted by the city of "Santa Cruz over and above and in excess of 15 per cent. "upon the assessed value of all taxable real and personal "property in said city of Santa Cruz at the time of the "issuance of such bonds."

The court erred in refusing to make said additional finding of fact for the following reasons, to wit: The undisputed evidence shows that all purchasers and holders of the bonds and coupons mentioned and set forth in plaintiff's complaint had knowledge from the recitals contained in each of said bonds that the same were issued pursuant to certain ordinances of the city of Santa Cruz, and in pursuance of a vote of the qualified electors of the city of Santa Cruz called and held under an act of the legislature of the State of California entitled "An "Act to amend an Act entitled 'An Act authorizing the "'comman council, board of trustees, or other governing "'body, of any incorporated city or town, other than "'cities of the first class, to refund its indebtedness, is- "'sue bonds therefor, and provide for the payment of the "'same (approved March 15, 1883),' approved March 1,

"1893;" and upon a notice of such election alleged in said recitals to have been given and published in the manner required by law. The Constitution of the State of California prohibited said city of Santa Cruz from contracting indebtedness or issuing bonds therefor except upon a vote of two-thirds of the qualified electors of such city by the following provisions of Section 18 of Article XI of said Constitution:

"No county, city, town, township, board of education, "or school district shall incur any indebtedness or lia- "bility, in any manner or for any purposes, exceeding in "any year the income and revenue provided for it for "such year, without the assent of two-thirds of the quali- "fied electors thereof voting at an election to be held for "that purpose, nor unless before or at the time of incur- "ring such indebtedness provision shall be made for the "collection of an annual tax sufficient to pay the inter- "est on such indebtedness as it falls due, and also to "constitute a sinking fund for the payment of the prin- "cipal thereof, within twenty years from the time of "contracting the same. Any indebtedness or liability in- "curred contrary to this provision shall be void."

Said act of March 1, 1893, required the previously existing indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof and sought to be refunded, to be specifically set forth in the notice of election, together with a specific statement of the number,

character, and amount of the refunding bonds to be issued therefor, by the following provision:

"The notice of such election shall recite the indebted-
"ness to be refunded, together with the denomination,
"character, time of payment, rate of interest, as well as
"all other details of the bonds proposed to be issued."

An act of the legislature of the State of California, namely:

"An Act to amend Section 5 of an Act approved March
"19, 1889, entitled, 'An Act authorizing the incurring of
"'indebtedness by cities, towns, and municipal corpora-
"'tions incorporated under the laws of this State, for the
"'construction of water works, sewers, and all necessary
"'public improvements, or for any purpose whatever;'
"and to repeal the act approved March 9, 1885, entitled
"'An Act to authorize municipal corporations of the fifth
"'class, containing more than 3,000 and less than 10,000
"inhabitants, to obtain water works,' also to repeal an
"act approved March 15, 1887, entitled, 'An Act author-
"'izing the incurring of indebtedness by cities, towns,
"'and municipal corporations incorporated under the
"'laws of this State, March 19, 1889,' approved March
"11, 1891" (Statutes of California, 1891, p. 84)—prohibited said city of Santa Cruz from incurring any indebtedness for public improvements in excess of 15 per cent. upon the assessed value of the taxable real and personal property within the corporate limits of said city.

The said provision of said act is as follows:

"No city, town, or municipal corporation shall incur "an indebtedness for public improvements which shall, "in the aggregate, exceed 15 per cent. of the assessed "value of all the taxable real estate and personal prop- "erty of such city, town, or municipal corporation."

Ordinances Nos. 314, 315, 320 of defendant, the city of Santa Cruz, set forth in the findings of fact filed herein and in the bill of exceptions filed herein, each showed clearly upon its face that said refunding bond issue, added to the pre-existing indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof, would constitute an indebtedness of at least $631,000; whereas, the assessment rolls (being public records required by law to be kept by the officers of the city of Santa Cruz) showed that the assessed value of all taxable and real and personal property within the city of Santa Cruz was $3,907,404, as appears in the amended complaint of plaintiff (Rec., p. 3; finding No. 5, p. 19); and said proposed refunding bond issue was in excess of 15 per cent. upon the assessed value of all of said taxable real and personal property in said city of Santa Cruz.

The bonds, upon the their face and by their recitals, gave notice of, and put all purchasers upon inquiry as to, the said fact that said indebtedness exceeded said limit of 15 per cent., and the said recitals in said bonds referred to the vote at the special election, which was a

matter of public record and notoriety, and which showed the said excess over 15 per cent.; and, moreover, as to the bonds purchased by E. G. and E. Wallace, they had further actual notice of said excess by the statement in the attorney's opinions furnished to them, stating expressly the amount of the refunding issue; and moreover, as to the bonds held by John Branch, the Wakefield Trust Company of Wakefield, Rhode Island, the First National Bank of Worcester, Massachusetts, the Albany City National Bank, the South Norwalk Savings Bank of South Norwalk, the Bank of Skaneateles, of Skaneatles, New York, the Kenduskeag National Bank of Bangor, Maine, the National Bank of Waterville, of Waterville, New York, and the First National Bank of Webster, Massachusetts, they had further actual notice of said excess from the circular or prospectus furnished them and each of them by Coffin & Stanton before their taking the bonds in question, which circular or prospectus shows the amount of the refunding bond issue, to wit: $360,000, and that said bonds were issued to refund outstanding bonds of said city of Santa Cruz to the amount of $320,000, issued for the purpose of obtaining water supply, and which said circular or prospectus further shows that the assessed valuation of all the assessed real and personal property in the city of Santa Cruz, at the time of the issuance of the said refunding bonds, was $3,907,400.

(Error Assigned, Rec., pp. 273-5.)

VIII.

That the court erred in refusing to make the following additional findings of fact requested by said defendant:

"That 450 bonds of the denomination of $500 each, "dated January 15, 1889, bearing interest at the rate of "5 per cent. per annum, issued by said city of Santa "Cruz, for purchase and construction of the city water "works, for the refunding of which, to the extent of "$225,000, the refunding bonds mentioned and described "in plaintiff's complaint were in part issued, were, and "each of them was, issued, sold and delivered by the "city of Santa Cruz after the act of the legislature of "the State of California authorizing their execution, is-"suance, sale and delivery had been repealed, namely, "after the 19th day of March, 1889" (Rec., p. 254).

The court erred in refusing to make said additional finding of fact, because it appears from the evidence, without contradiction, that nearly all of said 450 bonds of the denomination of $500 each, dated January 15, 1889, were issued and sold and delivered by the city of Santa Cruz after the 19th day of March, 1889, and that the act authorizing the execution, issuance, sale, and delivery of such bonds was, on the 19th day of March, repealed (pp. 217-18).

(Error Assigned, Rec., p. 275.)

IX.

That the court erred in making, at the suggestion of plaintiff and against the objection of defendant, the following additional finding of fact, as an amendment to Finding No. 12 of the original findings of fact filed in the cause, viz:

"Prior to the purchase of the bonds by E. G. & E. Wal-"lace, Messrs. F. H. Prince & Co. submitted to them a "copy of the following opinion of Z. N. Goldsby, the city "attorney of the defendant, practicing law in the city "of Santa Cruz, California, namely:

"'Santa Cruz, Cal., April 25, 1894.

"'I hereby certify that I have carefully examined all "'the steps taken and proceedings had relative to the is-"'suance of $360,000 in 5 per cent. refunding bonds by "'city of Santa Cruz, in the State of California, and the "'bonds issued pursuant thereto, dated April 16, 1894, "'and find said proceedings regular, and said bonds le-"'gally issued, and a valid and binding obligation of said "'city of Santa Cruz.

"'Z. N. GOLDSBY.'

"And also submitted a copy of the following opinion "of L. B. Gleason, an attorney-at-law, practicing in the "city of New York, namely:

"'Messrs. Coffin & Stanton,

"72 Broadway, New York City

"'Gentlemen: I return herewith certified copies of "'the proceedings of the officials of the city of Santa

" 'Cruz, Cal., with reference to the issuance of the refund-
" 'ing bonds of said city, bearing date of April 16, 1894.
" 'I have made a careful examination of these papers and
" 'of the Constitution and statutes of the State of Cali-
" 'fornia, with reference to the issuance of refunding
" 'bonds by cities of said State. All the provisions of the
" 'Constitution and the statutes of the State seem to have
" 'been most carefully and fully complied with, and from
" 'my examination I am of the opinion that these bonds
" are issued in pursuance of the laws relating thereto,
" 'and are legal and valid obligations of the said city of
" 'Santa Cruz.

" 'Yours truly,

" 'LAFAYETTE B. GLEASON.'

"The copies of the opinion of Goldsby and of Gleason
" were furnished to F. H. Prince & Co. by Messrs. Coffin
" & Stanton. These opinions were not satisfactory to E.
" G. & E. Wallace, and they asked for the opinion of
" some attorney practicing law in the city of Boston. F.
" H. Prince & Co. thereupon suggested that the opinion
" of M. F. Dickinson, Jr., an attorney practicing in that
" city, should be obtained; this suggestion was satisfac-
" tory to E. G. & E. Wallace, and it was then agreed be-
" tween F. H. Prince & Co. and E. G. & E. Wallace that
" the opinion of said Dickinson upon the question of the
" validity of said bonds should be obtained by F. H.
" Prince & Co. F. H. Prince & Co. then, on their own
" account and for themselves, and not acting as agents
" of E. G. & E. Wallace, employed said Dickinson to

"give his opinion in relation to the validity of such "bonds, and as the result of such employment, and as "the attorney of F. H. Prince & Co., Dickinson gave to "F. H. Prince & Co. the following opinion, which was "afterwards by said F. H. Prince & Co. submitted to "E. G. & E. Wallace, prior to their purchase of such "bonds:

"'Boston, August 29, 1894.

"'F. H. Prince & Co.,

"'2 and 8 State Street, Boston, Mass.—

"'Gentlemen: I have examined the papers that you "'have submitted in regard to the $360,000 5 per cent. "'refunding bonds of the city of Santa Cruz, Cal., dated "'April 16, 1894. In my opinion, the bonds are legally "'issued in conformity to the laws of the State of Cali- "'fornia and the ordinances of the city of Santa Cruz, "'and constitute a legal and valid obligation of said "'city.

"'Very respectfully yours,

"'M. F. DICKINSON, JR.'

"Said Dickinson had notice of all the matters recited "in the ordinances of the defendant city, numbered 314, "315, and 320, but Dickinson did not communicate this "knowledge of said ordinances, or of any of the facts "recited therein, to the said firm of E. G. & E. Wallace; "and the said Dickinson, in the examination of such "ordinances, and in giving said opinion, was not the "agent or attorney of E. G. & E. Wallace, but acted

"solely as the attorney of F. H. Prince & Co." (Rec. pp. 254-5-6).

The court erred in making said additional finding of fact, because it appears from the undisputed evidence that E. G. & E. Wallace specifically asked F. H. Prince, of the firm of F. H. Prince & Co., to procure for said firm of E. G. & E. Wallace the opinion of said M. F. Dickinson, Jr., as to the validity of the bonds and as to the regularity of the issuance thereof, and that F. H. Prince & Co. thereupon, not for themselves, but for the firm of E. G. & E. Wallace, consulted and employed said Dickinson, and procured from him, for said E. G. & E. Wallace, the opinion set forth in said finding upon the question of the validity of said bonds and the regularity of their issuance.

Said evidence is not contradicted, and is not inconsistent with any other evidence in the case, and it appears from said evidence that said Dickinson, in the examination of said ordinances and in giving said opinion, was the agent and attorney of E. G. & E. Wallace, and did not act solely or at all as the attorney of F. H. Prince & Co.

(Reference is here made to the testimony of Mr. Sumner Wallace, of the firm of E. G. & E. Wallace, as found on pp. 100-102 of the record, and as set forth in Assignment of Error No. 23 hereof.)

(Error Assigned, Rec., pp. 275-6-7.)

X.

That the court erred in making and finding, at the suggestion of said plaintiff and against the objection of said defendant, that portion of said last mentioned additional finding which reads as follows:

"F. H. Prince & Co. then, on their own account and for "themselves, and not acting as agents of E. G. & E. Wal- "lace, employed said Dickinson to give his opinion in "relation to the validity of such bonds, and, as the result "of such employment, and as the attorney of F. H. "Prince & Co., Dickinson gave to F. H. Prince & Co. "the following opinion, which was afterwards by F. H. "Prince & Co. submitted to E. G. & E. Wallace, prior to "their purchase of said bonds" (Rec., p. 256).

The court erred in making and finding said portion of said additional finding of fact, because said portion of said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence upon that subject in the case in this: That all of the evidence upon the subject of the employment of said Dickinson shows that he was employed by F. H. Prince & Co. as the agent of Messrs. E. G. & E. Wallace, not on account of nor for said F. H. Prince & Co., but on account of and for Messrs. E. G. & E. Wallace, the purchasers of said bonds.

(Reference is here made to the said testimony of Sum-

ner Wallace and Frederick H. Prince, as hereinbefore set forth and referred to.)

(Error Assigned, Rec., p. 277.)

XI.

That the court erred in making and finding, at the suggestion of plaintiff and against the objection of defendant, that portion of said last mentioned additional finding which reads as follows: "The said Dickinson, in the "examination of said ordinance, and in giving said opin- "ion, was not the agent or attorney of E. G. & E. Wal- "lace, but acted solely as the attorney of F. H. Prince & "Co." (Rec., p. 256).

The court erred in making and finding said portion of said finding, because said portion of said finding was not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence in the case in this: That all of the evidence upon the subject of the employment of said Dickinson, and upon the subject of his advice and opinion concerning the validity of said bonds, shows that he was the agent and attorney of E. G. & E. Wallace, and did not act solely or at all as the attorney of F. H. Prince & Co. (pp. 100-102, 246-8).

(Error Assigned, Rec., p. 278.)

XII.

That the court erred in making and finding that por-

tion of Finding No. 8 of the original findings of fact filed herein on September 29, 1898, which is in the words and figures following: "On the 26th day of March, 1894, "Ordinance No. 320 was duly enacted by the mayor and "common council of the defendant" (Rec., p. 256).

The court erred in making and finding said portion of said finding, because the same is not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence in the case in this: That it appears from the evidence that said ordinance was not duly enacted, in that there had been no election of defendant prior to the 26th day of March, 1894, for the reason that no notice of such election was published or given as required by law (p. 90 of the record), and that the polls at such purported election were closed one hour and fifteen minutes before the time provided by law for closing of the polls at such an election, less than one-half of the qualified electors of the city of Santa Cruz having, up to the time of the closing of the polls, voted at such election (p. 90 of the record). That the bond issue sought to be provided for in said ordinance was not authorized by any vote or action of the people of the city of Santa Cruz prior to the date of the alleged adoption of said ordinance, for the reasons hereinbefore in this assignment of error made and given; that ordinances numbers 314 and 315 of said city of Santa Cruz (Rec., pp. 26-39), submitting the proposition of refunding the alleged bonded indebtedness of the city of Santa Cruz, etc., showed on their face that a part of such alleged indebtedness to be

refunded consisted of indebtedness evidenced by the mortgage of a private corporation, to wit: the City Water Company of Santa Cruz, and that the question of refunding such purported indebtedness of said private corporation was so connected with the indebtedness evidenced by the bonds of the city of Santa Cruz that the electors of the city of Santa Cruz could not at such election vote for the refunding of the bonded indebtedness evidenced by the bonds of the city of Santa Cruz and against the bonded indebtedness evidenced by the bonds of said private corporation, or *vice versa* (Rec., pp. 26, 30-1, 34-5, 37-8).

(Error Assigned, Rec., pp. 278-9.)

XIII.

That the court erred in making and finding that portion of Finding of Fact No. 12 of the original findings of fact filed herein, which is in the words and figures following:

"All of the assignors of plaintiff, other than the one re-
" ferred to in Finding No. 3, and E. G. & E. Wallace, who
" purchased certain of the refunding bonds and coupons
" issued under the circumstances hereinafter set forth in
" this finding, were bona fide purchasers of the bonds
" and coupons assigned by them to plaintiff and sued on
" in this action, and were without notice of any fact tend-
" ing to impeach the truth of the recitals in said bonds" (Rec., p. 24).

The court erred in making and finding said portion of said Finding of Fact No. 12, in that it appears from the evidence that all of the purchasers mentioned in said portion of Finding of Fact No. 12 of the original fiindings of fact herein had notice of the ordinances Nos. 314 and 315, set forth in the additional findings of fact filed herein, by express reference to said ordinances in the recitals contained in each of said bonds, and had knowledge from such ordinances that the refunding bonds in question were issued in part for the purpose of refunding the mortgage bonds of a private corporation, namely, The City Water Company of the city of Santa Cruz; and for the further reason that the remaining portion of the alleged indebtedness to be refunded, a large part, and nearly the whole thereof, other than said private mortgage bonds, was no indebtedness of said city at all, and the 450 purported bonds by which the same are claimed to have been evidenced were void as having been nearly all issued in violation of and without authority of the law after the repeal of the statute under which an attempt was made to issue them, as set forth in Assignment No. 28, and had notice from said ordinances that the election required by law and by the constitution of California to be held upon the question of incurring indebtedness and issuing refunding bonds was not conducted in accordance with the laws of the State of California relating to such elections in the city of Santa Cruz in this: That at said election the polls were to be opened at sunrise and closed at 5 o'clock in the afternoon of the day of election

—one hour and fifteen minutes before the time provided by law for closing the polls at such election, and that no notice of such election was given or published as required by law and the ordinance of said city of Santa Cruz; and that the question of refunding the mortgage bonds of said private water company was so united with the proposition to refund the indebtedness of said city of Santa Cruz, evidenced by the bonds and warrants thereof, that the electors of said city of Santa Cruz could not vote for the refunding of the said indebtedness evidenced by the bonds and warrants thereof and against the refunding of said bonded indebtedness of said private corporation.

And it appears from the uncontradicted evidence that all of the purchasers had notice through said ordinances and through the assessment roll of said city of Santa Cruz that said refunding bond issue constituted an increase of the bonded indebtedness of said city of Santa Cruz to an amount in excess of 15 per cent. upon the assessed value of all taxable real and personal property in said city, and therefore constituted an over-issue of bonds contrary to the limitations imposed upon the contraction of indebtedness and the issuance of bonds on the part of said city of Santa Cruz by the laws of California (pp. 91-146).

It further appears from the uncontradicted evidence that John Branch, of the city of Boston, State of Massachusetts, and the plaintiff's assignor for the collection of one refunding bond, the first coupon of which is sued upon in this action, had actual notice of facts tending to

impeach the truth of the recitals in said bond before coming into possession of it.

John Branch testified as follows (pp. 91-2 of the record):

"I have been the owner of one of the principal bonds "purporting to be executed by the defendant on April "16, 1894, that is, bond No. 297, for $1,000, principal due "1927. About September 1, 1894, I had $1,000 that I "wanted to invest in some strong municipal bond, and "about that time a representative of Coffin & Stanton, a "bond house, as I supposed, of good repute, in New York, "offered me a Santa Cruz bond having a long time to "run, bearing 5 per cent., at par and accrued interest, "at 101, less 1 per cent. commission, and I thought the "bond was a good purchase, because the bond was a "refunding bond, and, also, from their financial state-"ment. When I purchased it I made no inquiries in re-"gard to the outstanding indebtedness of the city of "Santa Cruz, to refund which this series of bonds was "issued, nor did I make any inquiry in regard to the "title of Coffin & Stanton, or any members of that firm, "to the bond, and had no knowledge in regard to their "title from any source other than inquires made by me. "I had no knowledge relative to the condition of the out-"standing indebtedness of the city of Santa Cruz further "than the published statement made by Coffin & Stanton "of the indebtedness, together with the assessed valua-"tion and population, etc.— the usual statement fur-"nished by bond houses. I was furnished by Coffin &

"Stanton with copies of an opinion of attorneys. The "Santa Cruz attorney's name was Goldsby. My recol- "lection is that they were both California attorneys. "The opinions were sent to me with the bond. I exam- "ined them practically at the same time I paid for the "bond. I felt that the house of Coffin & Stanton was a "reputable house, and I knew about Santa Cruz, and "that an obligation against them was good, so I bought "the bond in good faith, believing that it was good and "would be paid."

It further appears from the uncontradicted evidence that the Wakefield Trust Company, of Wakefield, Rhode Island, the owner of one of the bonds assigned to plaintiff herein for collection, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of it.

John Babcock, a witness who was sworn on behalf of plaintiff, testified: That he is the treasurer of said Wakefield Trust Company, and that said trust company had in its possession a $1,000 bond purporting to be executed by the officers of the city of Santa Cruz on the 16th day of April, 1894, which said bond was taken by said trust company from Coffin & Stanton as collateral security for a loan made to Coffin & Stanton by said trust company; that when said trust company made the loan to Coffin & Stanton they were furnished by Coffin & Stanton with a letter and circular relative to said refunding bond issue, which said letter and circular are in the words and figures following, to wit:

"Coffin & Stanton, Bankers. New York. London.

"72 Broadway, New York, Aug. 26, 1894.

"Wakefield Trust Company,

"Wakefield, Mass.—

"Gentlemen: We have disposed of the $2,000 Illinois "Central 4 per cent. bonds which were held by you as "part collateral to our loan, for immediate delivery, and "therefore send you to-night, under separate registered "cover, $1,000 city of Santa Cruz, Cal., 5 per cent. bond "and $1,000 New York City Suburban Water Company "6 per cent. bond. Please send the Illinois Central "bonds by return registered mail; we have insured them "during transit. We enclose postage for that purpose.

"You are doubtless familiar with the merits of the "New York City Suburban bonds, as you at present "hold a number of them as collateral to our loan. We "might add we have made quite a number of sales of "these bonds within the past two weeks, at prices rang- "ing from 100 to 102½ and interest.

"We would call your attention to the fact that the "city of Santa Cruz is a prosperous city located in the "most highly improved portion of the State of Califor- "nia, in the vicinity of San Francisco, being peopled "principally by inhabitants from New York and the New "England States, who have gone thither in search of a "more congenial climate. The city's affairs are well "and intelligently conducted, we having been its fiscal "agents for many years, and have never known it to de- "fault or delay in the payment of interest upon any of its

"bonds. This issue was purchased by us after a thor-
"ough investigation by our Mr. Stanton upon the
"ground and after he had become satisfied as to the sta-
"bility of the city and its future prospects. We conse-
"quently have no hesitation in recommending the bonds
"as an excellent investment.

"Trusting that this substitution will meet with your
"approval, we remain,

"Yours truly,

"COFFIN & STANTON,

"T."

"Coffin & Stanton, Bankers. New York. London.

"We offer, subject to sale or advance in price,

"$300,000

"City of Santa Cruz, California,

"Five per cent. refunding gold.

"Dated April 16, 1894. Due as follows:

"Nine thousand dollars April 15, 1895, and $9,000 an-
"nually thereafter. Average time to run, twenty and
"one-half years. No option of redemption before ma-
"turity. Denomination, $1,000. Coupons annually,
"April 15. Payable at city treasurer's office, Santa
"Cruz. Real valuation, $9,768,600. Assessed valua-
"tion, $3,907,400. Total debt (this issue), $360,000.
"Issued to refund bonds (for water supply), $320,000.
"Net debt, $40,000. Including the suburbs, a total popu-
"lation of 11,000 is tributary to the water system. The
"corporate limits of the city has not been enlarged for
"many years.

"The water plant is a gravity system, costing about
"$370,000.

"A legal investment for savings banks in the States
"of Rhode Island, Pennsylvania, Maryland, and New
"Hampshire. Price, 101 and interest. Nets nearly 5
"per cent.

"Under the law governing saving banks' investments
"in the State of Massachusetts, the debt issued for water
"supply is deducted from the gross debt on the theory
"that such property is self-sustaining, and no burden
"upon the city. In estimating the debt indebtedness
"this rule has been followed" (Rec., pp. 95-7).

And that said circular above set forth gives the assessed valuation of all the real and personal property in the city of Santa Cruz and the total debt of said city, and thus clearly shows that the adding of the refunding bond issue to the then outstanding indebtedness of the city of Santa Cruz would necessarily increase the indebtedness of said city, if said bonds were valid, to an amount in excess of 15 per cent. upon the said assessed valuation of the real and personal property of said city.

It further appears from the uncontradicted evidence that the First National Bank of Worcester, Massachusetts, the owner of twenty-two of said refunding bonds assigned to the plaintiff for collection, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them. The plaintiff testified in his own behalf, and stated that he was the president of the First National Bank of Wor-

cester, Massachusetts, and that said bank had acquired possession of twenty-two bonds on account of a loan of $25,000, made at that time of Coffin & Stanton and represented by a promissory note of Coffin & Stanton, and that $12,000 Illinois Central 4's and $18,000 city of Santa Cruz 5's were pledged as collateral security for the payment of that note; and that he represented the bank in this transaction with Coffin & Stanton; that the bank made no investigation of the financial condition of the defendant prior to the making of this loan; but that Mr. Terrell, an agent of Coffin & Stanton, delivered to said plaintiff a circular (which was the same circular hereinbefore set forth), and that such circular gave all information that the First National Bank of Worcester had in regard to the financial condition of the city of Santa Cruz. It had no statement or opinion in respect to the validity of the issue. Mr. Terrell made satisfactory representations in regard to that (Rec., pp. 102-4).

It further appears from the uncontradicted evidence that the First National Bank of Hagerstown, Maryland, the holder of some of said refunding bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Frank W. Mish, an attorney for and director of said First National Bank of Hagerstown, Maryland, testified: That the said bank came into possession of bonds purporting to be executed by officers of the defendant on April 16, 1894; that said bonds were taken as security for

a loan made to Coffin & Stanton; and that said circular hereinabove set forth was furnished to said bank by said Coffin & Stanton before the transfer of said bonds to said bank (Rec., pp. 104-6).

It further appears from the uncontradicted evidence that the Albany City National Bank, the holder of twenty of said refunding bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them (Rec., pp. 106-8).

Jonas H. Brooks, a witness on behalf of the plaintiff, testified: That he was cashier of the Albany City National Bank, at Albany, N. Y.; that the refunding bonds held by said bank were obtained from Coffin & Stanton in the nature of collateral security for a loan made them; and that the said circular (hereinabove set forth) was also furnished to said Albany City National Bank by said Coffin & Stanton before the consummation of the transaction (Rec., pp. 106-7).

It further appears from the uncontradicted evidence that the South Norwalk Savings Bank of South Norwalk, the holder of eleven of said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals contained in said bonds before coming into possession of them.

John W. Ferriss, a witness on behalf of plaintiff, testified: That he is vice-president of the South Norwalk Savings Bank of South Norwalk; that the said eleven bonds purporting to be executed by officers of the defend-

ant, on the 16th of April, 1894, came into possession of the bank as collateral security for a loan made to Coffin & Stanton, of New York, by said bank; and that, before the transfer of said bonds from Coffin & Stanton to said bank, Coffin & Stanton had submitted to said bank the circular hereinabove set out (Rec., pp. 109-10).

It further appears from the uncontradicted evidence that the Bank of Skaneateales, of Skaneateales, New York, the holder of five of said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Benjamin F. Petheram testified: That he is cashier of said Bank of Skaneateales, and that said bank made a loan to Coffin & Stanton on their note, and took the said five bonds as collateral security therefor; and that before coming into possession of said bonds the said Bank of Skaneateales was furnished by Coffin & Stanton with the circular set forth hereinabove (Rec., pp. 110-12).

It further appears from the uncontradicted evidence that the Kenduskeag National Bank of Bangor, Maine, the holder of twelve of the said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Frederick W. Hill testified: That he is a director of said Kenduskeag National Bank, and that the said bonds were taken by said bank as collateral for a loan made to Coffin & Stanton by said bank, and that before

said bonds came into possession of said bank Coffin & Stanton furnished said bank with the circular hereinabove described, upon which the said bank relied (Rec., pp. 114-17).

It further appears from the uncontradicted evidence that the National Bank of Waterville, of Waterville, New York, the holder of one of said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of it.

Samuel W. Goodwin testified: That he is the President of the National Bank of Waterville; that the said bank came into possession of one refunding bond of the city of Santa Cruz, given as collateral security to a note of Coffin & Stanton; that he (the said president) had made a thorough investigation of the bonds at that time, having sent to him from Coffin & Stanton copies of letters from G. Bowman, then mayor of Santa Cruz, and also being told by Mr. Stanton that they had bought the bonds, and that they were the actual owners thereof, and that they did not at that time handle any bond except such as they were the actual owners of; and also that the bank was furnished with the said circular set forth above before it took the bond; and, further, that the bank relied upon the prospectus and previous investigation of other Santa Cruz bonds and the statement of Coffin & Stanton and the letter of G. Bowman, mayor; that the knowledge that the bank

had concerning the value of the bond at the time it was taken by the bank, and the financial condition of the city of Santa Cruz, was derived from the prospectus sent to the bank by Coffin & Stanton, and the knowledge obtained in the previous investigations (Rec., pp. 117-20).

It further appears from the uncontradicted evidence that the First National Bank of Webster, Massachusetts, the holder of four of said bonds assigned to plaintiff herein, had actual notice of acts tending to impeach the truth of the recitals thereof before coming into possession of them.

Edward L. Spaulding testified: That he is the cashier of said First National Bank, and that said refunding bonds came into the possession of said bank as collateral, being security for a loan advanced Coffin & Stanton by the bank, and that the said printed statement or circular above set forth was furnished said bank before it took the bonds (Rec., pp. 120-23).

And for the further reason that the bonds upon their face and by their recitals gave notice of and put all purchasers upon inquiry as to the fact that the indebtedness created by the refunding bond issue, added to the pre-existing indebtedness of the city of Santa Cruz, exceeded the limit of 15 per cent., beyond which limit said city of Santa Cruz could not lawfully incur indebtedness; and the recitals in said bonds refer to the vote at the special election, which was a matter of pub-

lic record and notoriety, and which showed the said excess over 15 per cent.

(Error Assigned, Rec., pp. 279 to 285.)

XIV.

That the court erred in making and finding that portion of Finding of Fact No. 12 of the original findings of fact filed herein, which said portion of said findings of fact is set forth and referred to in the specification of error last hereinabove set forth, for the following reasons, to wit:

That the refunding act of 1893, under which the bonds herein questioned were issued, is in conflict with the constitution of the State of California in that said act is a local and special law relating to a subject concerning which the constitution of the State of California required all laws to be general; that said bond issue was illegally made because in excess of the bonded indebtedness which the city of Santa Cruz could contract under the laws of the State of California in force at the time when said bonds were issued; that said refunding act, under which said bonds are alleged to have been issued, did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives the power to the governing body of any city within the classes selected to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its out-

standing indebtedness, evidenced by bonds and warrants thereof, and specifies the manner in which said election shall be called and held, and the form of notice to be given of such election, there is no provision in the act, or in any other act or law of the State of California, as to what shall be the result of a vote favorable to refunding at such election, and that said refunding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding, the city, or its governing body, or its executive head, or any other officer or agent, shall have power to make or issue refunding bonds; that said refunding act is unconstitutional in that it is in violation of the provisions of the constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract; that said bonds sued upon herein are payable only in gold coin of the United States, in violation of the provisions of said refunding act of 1893, under which said bonds were issued, which requires that bonds issued under the terms and authority thereof shall be payable in gold coin of lawful money of the United States; that it appears from the uncontradicted evidence herein that said refunding bonds sued upon herein were not sold by the city of Santa Cruz for their face value in gold coin, as required by said refunding act of 1893, and that said city of Santa Cruz received no consideration whatever for said bonds (Rec., p. 218); that it appears from the uncontradicted evidence herein that no notice of an election submitting to the elec-

tors of said city of Santa Cruz the question of refunding the bonded indebtedness thereof was ever given or published as required by law or at all (Rec., pp. 19, 20, 32, 39, 60, 90); and that it appears from the uncontradicted evidence herein that no election was ever held or had in said city of Santa Cruz at which two-thirds of the electors of said city, voting at such election, voted in favor of issuing bonds for the purpose of refunding the outstanding indebtedness of said city, as required by the constitution of the State of California, in this, to wit: that at the purported election held in said city of Santa Cruz, at which electors of said city voted on the proposition of refunding the outstanding indebtedness thereof, less than one-half of the qualified electors of said city voted, and the polls at such purported election were closed one hour and fifteen minutes before the time provided by law for their closing, and that such purported election was held and conducted without notice thereof given and published in the manner required by law or at all (Rec., p. 32); that it appears from the uncontradicted evidence that the refunding bonds sued upon herein were not executed or issued by the city of Santa Cruz, and were not signed by the mayor of the said city of Santa Cruz, but that the greater portion thereof (it being impossible to identify which portion of which bonds) were signed by one William T. Jeter on the afternoon of the 16th day of April, 1894, after the election and qualification of the successor of said William T. Jeter as mayor

of the city of Santa Cruz, and after the term of said William T. Jeter as mayor of said city had expired, and while said William T. Jeter was neither *de jure* nor *de facto* mayor of said municipality, the city of Santa Cruz (Rec., pp. 22, 146, 150); and that it appears from the uncontradicted evidence herein that said refunding bonds, so sued upon, were issued in part for the refunding of the mortgage bonds of a private corporation, namely, the City Water Company of Santa Cruz, in violation of the provisions of the refunding act of 1893, under which said refunding bonds are alleged to have been issued, and in violation of the constitution of the State of California.

(Error Assigned, Rec., pp. 285-6).

XV.

That the court erred in making and finding that portion of Finding of Fact No. 12 of the original findings of fact filed herein, which is in the words and figures following, to wit:

"Therefore, knowledge of F. H. Prince & Co. concern-
" ing the illegality of said bonds, as shown by ordi-
" nances numbered 314, 315 and 320, was not construct-
" ive notice thereof to E. G. & E. Wallace."

The court erred in making and finding said portion of said finding, because said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all of the evidence upon that subject in the

case, and because the evidence shows that F. H. Prince & Co. were, in the matter of purchasing the bonds in question, and in the whole of said transaction, the agents for all purposes of said E. G. & E. Wallace (Rec., pp. 91, 102, 235-8, 242-5).

(Error Assigned, Rec., pp. 286-7.)

XVI.

That the court erred in making and finding that portion of Finding of Fact No. 12 of the original findings of fact filed herein, which is in the words and figures following, to wit:

"Nor did E. G. & E. Wallace have any actual knowl-"edge or actual notice of said matters, nor of any fact "tending to impeach the truth of the recitals contained "in the bonds."

The court erred in making said portion of said Finding of Fact No. 12 of the original findings of fact filed herein that it appears from the evidence (Rec., pp. 235-245, 246-7) that said E. G. & E. Wallace had notice of the ordinances Nos. 314 and 315 set forth in the additional findings of fact filed herein (Rec., pp. 26 to 41), by express reference to said ordinances in the recitals contained in each of said bonds, and had knowledge from such ordinances that the refunding bonds in question were issued in part for the purpose of refunding the mortgage bonds of a private corporation, namely, the

City Water Company of the city of Santa Cruz; and had knowledge that the remaining alleged indebtedness of the city of Santa Cruz to be refunded, a large part, and nearly the whole thereof, other than said private mortgage bonds, was no indebtedness of said city at all, and the 450 purported bonds by which the same are evidenced were void, as having been nearly all issued in violation of and without authority of law after the repeal of the statute under which an attempt was made to issue them, as set forth in Assignment No. 28; and had notice from said ordinances that the election required by law and by the Constitution of California to be held upon the question of incurring indebtedness and issuing refunding bonds was not conducted in accordance with the laws of the State of California relating to such election in the city of Santa Cruz, in this: that at said election the polls were to be opened at sunrise and closed at 5 o'clock in the afternoon of the day of election—one hour and fifteen minutes before the time provided by law for closing the polls at such election; and that the question of refunding the mortgage bonds of said private water company was so united with the proposition to refund the indebtedness of said city of Santa Cruz, evidenced by the bonds and warrants thereof, that the electors of said city of Santa Cruz could not vote for the refunding of said indebtedness, evidenced by the bonds and warrants thereof, and against the refunding of said bonded indebtedness of said private corporation; and that the notice required by law to be published and given of such election was not

published or given, and that no notice of such election was published or given. And it appears from the uncontradicted evidence that said E. G.& E. Wallace had notice through said ordinances and through the assessment roll of said city of Santa Cruz, and through the vote at said alleged election, that said refunding bond issue constituted an increase of the bonded indebtedness of said city of Santa Cruz to an amount in excess of 15 per cent. upon the assessed value of all taxable real and personal property in said city, and therefore constituted an over-issue of bonds, contrary to the limitations imposed upon the contraction of indebtedness and the issuance of bonds on the part of said city of Santa Cruz by the laws of the State of California.

(Error Assigned, Rec., pp. 287-8.)

XVII.

That the Court erred in failing to make any finding of fact on the issue joined by the defendant's answer that 450 of the bonds of the city of Santa Cruz of the denomination of $500.00 each, to refund which, in part, the said purported election was held, and the refunding bonds sued upon herein were, and each of them was, invalid and void, for the reason that all and each of said bonds were and was executed, sold and delivered after the act of the Legislature of the State of California authorizing their execution, sale and delivery

had been repealed, namely, after the 19th day of March, 1889 (Rec., pp. 12, 13, Nos. II and III).

(Error Assigned, Rec., p. 288.)

XVIII.

That the court erred in overruling the defendant's objection to the question asked the witness O. J. Lincoln, upon the grounds that the same was irrelevant, immaterial and incompetent. Said question and the answer thereto are as follows:

"Q. Mr. Lincoln, who performed the duties of the "office of mayor of the city of Santa Cruz between "April 16, 1894, and May 7, 1894? A. Mr. Jeter."

It has been established by the testimony of Robert Effey and by documentary evidence (Rec., p. 146), that the said Robert Effey, on the 16th day of April, 1894, was the duly elected and qualified mayor of the city of Santa Cruz for the term of two years following April 16, 1894. The said question asked the witness Lincoln was for the purpose of proving that some one else, and not Mr. Effey, was mayor of the city of Santa Cruz between April 16, 1894, and May 7, 1894; and said question was immaterial, irrelevant and incompetent, and the admission of the answer thereto prejudicial to the defendant.

(Error Assigned, Rec., p. 262.)

XIX.

That the court erred in overruling the objection of defendant to a question asked the witness William T. Jeter, on the grounds that the same is immaterial, irrelevant and incompetent. Said question and the answer thereto are as follows:

"Q. Mr. Jeter, who performed the duties of the office "of mayor of Santa Cruz from April 16 to May 7, 1894?

"A. I acted as mayor until the evening of the 7th of "May, as near as I can recollect" (Rec., p. 149).

It had been established by the testimony of Robert Effey, and by documentary evidence as hereinabove in these assignments of error stated, that on the 16th day of April, 1894, Robert Effey was the duly elected and qualified mayor of the city of Santa Cruz for the then ensuing term of two years; and the said question asked the witness Jeter was for the purpose of showing that he (Jeter) was mayor of the city of Santa Cruz from April 16th to May 7th, 1894, and said question was immaterial, irrelevant and incompetent, and the admission of the answer thereto prejudicial to the defendant.

(Error Assigned, Rec., p. 263.)

XX.

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that at the time of the execution, issuance, sale and delivery

of said 225 bonds of the city of Santa Cruz, the sum thereof, namely, $225,000.00, was in excess of the amount of the indebtedness which the city of Santa Cruz might lawfully incur at the time of the execution, issuance, sale and delivery thereof for the purpose for which said bonds were issued, namely, for public improvements (Rec., pp. 13, 26, 217, 219).

(Error Assigned, Rec., p. 288.)

XXI.

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that the eighty-nine so-called first mortgage bonds of the private corporation, of the City Water Company of Santa Cruz, of the denomination of $1,000.00 each, were, and each of them was, without right and without authority, issued by a private corporation known as the City Water Company of Santa Cruz upon a pretended mortgage, executed without right or authority by said private corporation, upon municipal property of the city of Santa Cruz, and that no part of the sum of said so-called first mortgage bonds, nor of said mortgage, is or ever was a part of the municipal indebtedness of the city of Santa Cruz, and no part thereof was ever evidenced by bonds and warrants of the city of Santa Cruz (Rec., p. 13.)

(Error Assigned, Rec., p. 288.)

XXII.

That the court erred in failing to make any finding of fact on the issue joined by defendant's answer that no election was, on the 13th of March, 1894, or at any other time at all, held or conducted in the city of Santa Cruz on the question of refunding the outstanding indebtedness or any indebtedness of said city (Rec., pp. 14, 15, No. X).

(Error Assigned, Rec., p. 289.)

XXIII.

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that the alleged refunding bonds or obligations of the city of Santa Cruz, described in the plaintiff's amended complaint, together with the alleged coupons thereto attached, including the nine alleged bonds and the 282 alleged coupons sued upon by plaintiff herein, were, and each of them was, on the 23d day of April, A. D. 1894, by one Walter Stanton, willfully, unlawfully and feloniously taken, stolen and carried away from the possession of the city clerk of said city of Santa Cruz (Rec., p. 15, No. 1).

(Error Assigned, Rec., p. 289.)

XXIV.

That the court erred in failing to make any finding of

fact on the issue joined by the defendant's answer that the pretended issue of 360 of the so-called refunding bonds of the par value of $1,000.00 each on the 16th day of April, 1894, as set forth in the plaintiff's amended complaint, was an unlawful attempt without authority on the part of the mayor and common council of the city of Santa Cruz to increase the bonded indebtedness of said city beyond the limit of 15 per cent. upon the assessed value of all taxable real and personal property of said city, as prescribed and fixed by the laws of the State of California (Rec., p. 16, No. IV).

(Error Assigned, Rec., p. 289.)

XXV.

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that said pretended issue of 360 so-called refunding bonds of the par value of $1,000.00 each on the 16th day of April, 1894, as set forth in plaintiff's amended complaint, and every part and portion of said pretended bond issue, and each and every pretended bond thereof, is, and at all times has been, an attempted over-issue of municipal bonds of the city of Santa Cruz (Rec., p. 16, No. V).

(Error Assigned, Rec., p. 289.)

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that said so-called refunding bonds sued upon herein and the

coupons thereto, and each and all of them, were and was fraudulently taken by one Walter Stanton from the custody of the city clerk of the city of Santa Cruz on or about the 24th day of April, 1894, and then and there by him, the said Walter Stanton, appropriated to his own use (Rec., p. 17, No. II).

(Error Assigned, Rec., p. 289.)

XXVII.

That the court erred in making and finding that portion of the first conclusion of law found by said court, which reads as follows: "That William T. Jeter was *de* "*facto* mayor of the defendant city of Santa Cruz on the "16th day of April, 1894, and so continued until May 7, "1894" (Rec., p. 25), for the following reasons:

That said portion of said conclusion of law is not supported by any of the findings of fact herein.

That it appears from the ninth finding of fact herein (Rec., p. 22) that William T. Jeter was duly elected mayor of the city of Santa Cruz on May 11, 1892, and that his successor, Robert Effey, was duly elected mayor of said city on the ninth day of April, 1894, and duly qualified as such mayor between the hours of 11 o'clock a. m., and 2 o'clock p. m., of April 16, 1894; that upon the qualification of Robert Effey as mayor of Santa Cruz he became the *de jure* mayor of said city of Santa Cruz; that thereafter, on said 16th day of April, 1894, the said William T. Jeter performed no function, and exercised

no act, either publicly or notoriously, which gave notice to, or caused the people of the city of Santa Cruz to believe or to know that he was acting as, or intended to act as, or was exercising the functions of, or intended to exercise the functions of the office of mayor of the city of Santa Cruz.

That it appears from Finding of Fact No. 13 (Rec., p. 24) that some of the bonds sued upon herein were signed by William T. Jeter on April 16, 1894, after the qualification of his successor in the office of mayor; and it does not appear from the finding of fact, or any finding of fact herein, that at the time of signing said bonds said William T. Jeter was either publicly or openly or notoriously exercising the functions, or attempting to exercise the functions of mayor of said city of Santa Cruz; and that it does not follow from the facts found that Jeter was at any time after the qualification of his successor the *de facto* mayor of said city, and no facts are found showing that he was such *de facto* mayor during such time.

(Error Assigned, Rec., p. 290.)

XXVIII.

That the court erred in making and finding that portion of the first conclusion of law found by said Court which reads as follows: "And that he, and the persons "who assumed to act as members of the common council "of defendant, on the 16th and 23rd days of April, 1894,

"to wit: J. F. Hoffman, E. G. Greene and F. W. Lucas, "were on those days the *de facto* mayor and the *de facto* "members of the common council of the defendant city" (Rec., p. 25), for the following reasons, to wit:

That said portion of said conclusion of law is not supported by any finding of fact herein, in that it appears from the findings of fact herein (Rec., p. 22) that on the 9th day of April, 1894, Robert Effey was duly elected as mayor of said defendant city, to succeed William T. Jeter, and duly qualified as such between the hours of 11 o'clock a. m. and 2 o'clock p. m. of April 16, 1894, and Messrs. Henry G. Insel, John Howard Bailey, J. D. Maher, and Frank K. Roberts were, on the said 9th day of April, 1894, duly elected members of the common council of said defendant city, and all of them duly qualified as such councilmen before the meeting of the common council of said defendant, held April 16, 1894; and that it does not follow from the facts found that said Jeter was, at any time after the qualification of his successor on the 16th day of April, 1894, the *de facto* mayor of said city of Santa Cruz, or that said Hoffman, Greene, and Lucas were, at any time after the qualification of their successors as members of the common council of said city of Santa Cruz, *de facto* members of said common council; and no facts were found showing that said Jeter was *de facto* mayor, or that said Hoffman, Greene, and Lucas were *de facto* members of the common council during such time.

(Error Assigned, Rec., p. 290-1.)

XXIX.

That the court erred in making and finding that portion of Conclusion of Law No. 1 herein which reads as follows:

"And that the bonds and coupons sued on are upon " their face valid obligations of the defendant" (Rec., p. 25), for the following reasons, to wit:

That said portion of said conclusion of law is not supported by the findings of fact herein, or by any finding of fact herein.

That the act of the legislature of the State of California entitled, "An Act to amend an Act entitled, 'An Act " 'authorizing the common council, board of trustees, or " 'other governing body of any incorporated city or town, " 'other than cities of the first class, to refund its indebt- " 'edness, issue bonds therefor, and to provide for the " 'payment of the same (approved March 15, 1883)' (ap- " proved March 1, 1893)," by authority of which, and under the terms of which, it is alleged that the bonds sued on were issued, is in conflict with the Constitution of the State of California in that said act is a local and special law relating to a subject concerning which the Constitution of the State of California requires all laws to be general.

That said bonds and coupons were and are invalid because in excess of the amount of bonded indebtedness which the city of Santa Cruz could contract under the

laws of the State of California in force at the time when said bonds were issued.

That the said act of the legislature of the said State of California above referred to and entitled, did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives power to the governing body of any city within the classes limited, to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its outstanding indebtedness evidenced by bonds and warrants thereof, and specifies the manner in which elections shall be called and held and the form of notice to be given of such election, there is no provision in the act, nor in any other act or law of the State of California, as to what shall be the result of a vote favorable to refunding at such an election, and that said refanding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding the city or its governing body, or its executive head, or any other officer or agent, shall have power to make or issue refunding bonds.

That said refunding act under which said bonds are alleged to have been issued is unconstitutional in that it is in violation of the provision of the Constitution of the United States, which forbids any State to pass any law impairing the obligations of a contract.

That said bonds show upon their face that they are invalid for the reason that they are payable in gold coin of the United States (Rec., p. 4), in violation of the pro-

vision of said refunding act of 1893, under which said bonds were issued, which requires that said bonds issued under the terms and authority thereof shall be payable in gold coin or lawful money of the United States.

That it appears from the findings of fact herein that a large portion of said bonds, which portion it is impossible to identify, were not executed by the city of Santa Cruz, nor signed nor executed by any officer thereof, but were, on the 16th day of April, 1894, after the qualification of his successor, signed by one William T. Jeter, pretending to act as mayor of said city of Santa Cruz, after his term of office had expired, and while he was no longer either a *de jure* or a *de facto* officer of said municipality (Rec., p. 22, No. 9).

That it appears in the findings of fact herein that the plaintiff did not pay any money consideration for said bonds, but that they were assigned to him without consideration and for collection only (Rec., p. 18, No. 2).

That it appears from the findings of fact herein that said bonds constituted *an* over-issue of indebtedness of the city of Santa Cruz, in violation of the laws of the State of California (Rec., p. 19, No. 5).

That it appears in the findings of fact herein that said bonds were issued in part for the purpose of refunding the mortgage bonds of a private corporation, to wit: the City Water Company of Santa Cruz, which said bonds were neither bonds nor warrants of said defendant the city of Santa Cruz, and were not evidences of the indebt-

edness of the city of Santa Cruz (Rec., p. 19, No. 5, pp. 26-8).

That it appears in the findings of fact herein that ordinance No. 315 of said defendant city, dated February 26, 1894 (Rec., pp.19-20, No. 6, pp. 33-9), provided for and required notice to be given of an election to be held for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the outstanding indebtedness thereof, which said ordinance directed the city clerk to cause to be published in the "Santa Cruz Surf" and "Santa Cruz Sentinel," for not less than ten days before the thirteenth day of March, 1894, a notice of such special election, and to post said notice at each place of election in said city, and which ordinance further provided that the notice so to be published and posted should be substantially in the words and figures set out in said ordinance, and should contain, among other things, a recital of the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued, and that the polls at such election would be opened at sunrise in the morning of said day of election, and should close at 5 o'clock p. m. of the same day.

And it further appears from said findings of fact that such notice of election, so provided for and required to be given and published, was not, in fact, either given, made, or published as required by said ordinance or by the laws of the State of California, or at all, and that no

notice of such election was ever given or published (Rec., p. 20, No. 7).

That it further appears from said findings of fact that said Ordinance No. 315 of said city of Santa Cruz, being the only ordinance providing for notice to be given of such election, required that the polls at such election should be opened at sunrise in the morning of said day, and should close at 5 o'clock p. m. of said day, in violation of the laws of the State of California then in force which required that the polls at such election should not be closed until sundown of the day thereof (Rec., pp. 19, 38), and that it appears from said findings of fact that the polls at such alleged election were opened and closed at the hours named in said ordinance (Rec., p. 19, No. 6), in conflict with and contrary to the provisions of the laws of the State of California with reference to the opening and closing of polls at such an election.

That it appears from said findings of fact that Ordinance No. 314 of said defendant city of Santa Cruz, calling an election for the purpose of submitting to the qualified electors of said defendant city the question of issuing bonds to refund the outstanding indebtedness thereof, and Ordinance No. 315, providing the form of notice to be given of such election and requiring the clerk of said city to publish the notice aforesaid, each showed upon its face that the alleged indebtedness to be refunded consisted in part of 89 bonds of the private corporation, the City Water Company of Santa Cruz, which said bonds were of the value of $89,000.00, and which said

bonds were neither valid nor existing indebtedness of the city of Santa Cruz, nor did they constitute or evidence any indebtedness of the city of Santa Cruz represented by bonds or warrants thereof (Rec., pp., 19, 26, 34), and that it was impossible for the electors of said city of Santa Cruz, or any elector of said city, at such election, so-called, to vote in favor of refunding the indebtedness of the city of Santa Cruz, evidenced by bonds or warrants thereof, and against the refunding of indebtedness evidenced by the bonds of said private corporation, the City Water Company of Santa Cruz (Rec., pp. 26-7, 30-1, 34, 37-8).

That it appears from the findings of fact that no election was ever held in the city of Santa Cruz, nor by the electors thereof, for the purpose of determining the question of the refunding of the outstanding indebtedness of the city of Santa Cruz evidenced by bonds or warrants thereof (Rec., pp. 19, 20, Nos. 6 and 7).

That it appears from said findings of fact that no election was ever held in the city of Santa Cruz, nor by the electors thereof, for the purpose of determining the question of refunding any indebtedness whatever (Rec., pp. 19-20).

That it appears from said findings of fact that said bonds were never issued by the defendant, the city of Santa Cruz, but that, on the 16th day of April, 1894, one William T. Jeter, pretending to act as mayor of said city, and J. Howard Bailey, F. J. Hoffman, E. G. Greene, and F. W. Lucas, pretending to act as the common council of

said city, in violation of law, and without bids therefor having been received for the purchase of said bonds, and without authority of law, accepted a certain proposition of Coffin & Stanton to take said bonds, and all thereof, which proposition is dated February 27, 1894, and is set forth in Finding of Fact of No. 10 herein (Rec., p. 22, No. 9; pp. 22-3, No. 10).

That said proposition was illegal, and that said persons so pretending to act as mayor and common council of said city of Santa Cruz had no authority or right to accept said proposition.

That it further appears from said findings of fact that the said William T. Jeter, pretending to act as mayor of said city, and the said Lucas, Bailey, Hoffman, and Greene, pretending to act as members of the common council thereof (Rec., p. 22), without authority of law, and without any right or authority whatever in the premises, and in direct violation of the laws of the State of California, and particularly in violation of the provisions of the refunding act of 1893, under which it is alleged said bonds were issued, directed the clerk of said defendant city to deliver said refunding bonds, and all thereof, to Coffin & Stanton, without consideration, and without any value whatever of any kind being received therefor; and that said bonds were, in accordance with such direction delivered to Coffin & Stanton on April 24, 1894 (Rec., p. 23, No. 11).

That it further appears from said findings of fact that said proposition of Coffin & Stanton above referred to

and set forth in Finding No. 10 herein (Rec., pp. 22-3), was never in fact carried out by said Coffin & Stanton, or by any one, and that the city of Santa Cruz received no consideration whatever for said bonds, or for any of them (Rec., p. 24, No. 15).

That it appears affirmatively from said findings of fact that, except as against bona fide purchasers without notice, for a valuable consideration, said bonds were invalid and did not constitute valid or other obligations of the defendant (Rec., pp. 18-19, No. 3; p. 25); that the only allegation of the complaint herein in regard to the character of the plaintiffs as bona fide holders without notice was, that said bonds were delivered to one Walter Stanton, for value received, and that said Stanton, afterwards and before the maturity thereof, sold and delivered to the plaintiff herein certain of said bonds and certain coupons (Rec., p. 6).

That there is no evidence or finding to sustain said allegations of said complaint, but that both the findings and the evidence show that the same were untrue and that said bonds were not delivered, nor were any of them delivered, to said Stanton, nor was any value received therefor, and that said Stanton did not sell or deliver any of said bonds or coupons to the plaintiff (Rec., p. 18, No. 2; p. 24).

That the only authority for the issuance or delivery of said bonds is that contained in the statutes of California; and that by the provisions of said statutes the condition precedent to the exercise of such authority was the

existence of an outstanding indebtedness evidenced by bonds and warrants of the city or town, and that, when such valid indebtedness so evidenced did actually exist, said authority could only be exercised in strict pursuance of the provisions of said statutes, especially the statute of March 1, 1893, including an election to be held for the purpose of refunding such indebtedness, and such indebtedness only, and that, in such case, it was necessary, under the statute, that the notice of such election should recite such indebtedness and show the same to be a valid indebtedness of said city or town to the extent of which indebtedness only could refunding bonds be issued.

That the questions of the existence of such indebtedness and of the sufficiency of such notice of election and the recitals thereof were strictly jurisdictional and went to the foundation and essence of the power of the common council, board of trustees, or other governing body, to proceed under such statute, and such questions were not left to the determination of such common council, board of trustees, or other governing body thereof, and that they could not give themselves jurisdiction by any determination or recital of that nature; and that, according to said statute, said refunding bonds could only be issued and disposed of in the manner specified in said statute, to wit: by being sold in the manner provided by such city council, or the governing body, to the highest bidder, for not less than their face value, and that, in such event, the proceedings of such sale must be placed in

the treasury to the credit of the refunding fund, and applied only for the purpose of refunding the indebtedness for which they had been issued, and that under said statute, such proceedings, after the issuance of said bonds, to wit: the selling thereof and the placing of the proceeds, were also jurisdictional, and the fact that they had been had in accordance with law was not committed by the law to the determination of the decision of said officials of said city or town, and could not be concluded thereby; and that it appeared on the face of said bonds that they were issued for the purpose of refunding the bonded indebtedness of said city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same, under the said statute approved March 1, 1893, and in pursuance of the ordinances of the city of Santa Cruz, and of a vote of the electors of said city of Santa Cruz voting at an election called and held under said statute, and that, therefore, every purchaser of said bonds was affected with notice of said statute and all its conditions, requirements, and limitations, and had notice of said ordinances and said notice of election, and that said statute had not been complied with, and that the debt sought to be refunded was not such an indebtedness as could be refunded under said statute, and that said election was not held according to law, nor called according to law, and was put upon inquiry as to all the actual facts concerning the attempt to refund said indebtedness and make and issue said bonds; and that such inquiry, being pur-

sued with ordinary diligence, would necessarily have resulted in the ascertaining from record evidence and authentic documents and official documents of the facts showing the entire invalidity of said bonds, and all such puchasers were bound to know the terms of said statutes; and that there was no authority conferred by said statutes, or by any law of California upon said municipality to issue negotiable bonds, or bonds negotiable in the sense of precluding an inquiry between the municipality and such purchasers into the actual facts concerning the validity of said bonds.

(Error Assigned, Rec., pp. 291-6.)

XXX.

That the court erred in making and finding Conclusion of Law No. 2 herein, to wit: "That E. G. & E. Wallace "were bona fide purchasers of the bonds and coupons as- "signed by them to plaintiff without notice of the facts "recited in the ordinances of the defendant numbered "314, 315 and 320, and without notice of any fact tend- "ing to impeach the truth of the recitals contained in "said bonds" (Rec., p. 25), for the following reasons, to wit:

That said conclusion of law is not supported by the findings of fact herein, nor by any finding of fact herein.

That, for the reasons, and each thereof, assigned and given in Specification of Error No. XXIX, said E. G. &

E. Wallace had full notice of all the facts tending to impeach the truth of the recitals contained in said bonds, and for the further reasons:

That, in addition to the recitals on said bonds, the said E. G. & E. Wallace did not rely solely upon said recitals, and did not purchase said bonds on the face of any representations, assertions, or acts of the said city of Santa Cruz, but did in fact institute, and cause to be instituted by their agents and attorneys, an inquiry going back of and beyond the face of the bonds into their sufficiency and the regularity of the proceedings leading up to their issue, and particularly, in that respect, procured and obtained, before purchasing said bonds, the opinions of Z. N. Goldsby, Lafayette B. Gleason, and F. M. Dickinson, Jr., attorneys mentioned in the findings herein (Rec., pp. 39, 41-1), from the face of which opinions said E. G. & E. Wallace were further informed that said attorneys had had and examined and considered all the documentary and other evidence bearing upon the validity of said bonds, and had been fully informed of all the facts showing the invalidity thereof, and had had full notice of the fact that said ordinance submitted a proposition to refund indebtedness which could not be refunded under the statute, and that the notice of election also showed that the indebtedness so refunded was such as the city had no power to refund under the statute, and that the election was not called or had according to law and the statute (Rec., pp. 26 to 32 and 33 to 39), and that the bonds were not sold or disposed of as required by law

(Rec., pp. 22-3); and, having so sought and obtained such information, and relying upon the opinions of said attorneys and the result of their investigations, said E. G. & E. Wallace could not claim to be bona fide purchasers, or to be entitled to any estoppel against the city arising on the face of the bonds, but, having made such investigation and inquiry, and having acted upon said opinions and reports of their agents and attorneys as aforesaid, they were bound by the result, and all of the results, of such an investigation, and cannot escape the imputation of any knowledge resulting from a diligent and full investigation of the sources of inquiry open to them and to all the world on the face of authentic and recorded and official documents; and for the further reason that said E. G. & E. Wallace, as appears by the findings herein, were affected with actual notice of all the facts showing the invalidty of said bonds by reason of such actual notice on the part of F. H. Prince & Company, their agents in the transaction.

(Error Assigned, Rec., pp. 296-7.)

XXXI.

That the court erred in making and finding the general conclusion of law that the plaintiff is entitled to recover as against the defendant on all the bonds and coupons assigned to him, excepting the three coupons assigned to him by the Northern Counties Investment Trust Company, Limited, a judgment in the sum of $22,-

950.00 and interest thereon from April 15, 1895, and costs of suit (Rec., p. 25), for the reasons specified in Assignments of Error Nos. 47, 48, 49 and 50, on pages 290 to 296, both inclusive, of the record herein.

(Error Assigned, Rec., p. 297.)

XXXII.

That the court erred in rendering the judgment herein against the defendant upon its findings of fact herein in that the facts found by the court do not sustain the judgment rendered by the court, and that upon said findings, either a judgment should be rendered for the defendant, or a *venire de novo* should be ordered for insufficiency of the findings; and defendant specifies that it appears from said findings that the refunding bonds issued by the defendant, and of certain of which bonds and coupons attached thereto the plaintiff claims to be the owner and holder, were issued without authority of law and in disregard of the provisions of the statute under which they purport to have been issued, and were not valid obligation of the defendant in that it appears from said findings that the indebtedness to refund which said bonds were issued was not a valid indebtedness of the city of Santa Cruz evidenced by its bonds or warrants, but that the proposition submitted to the voters was as specified in the notice of election and in the ordinance of the city recited in the bonds, a proposition to refund not only certain bonds purporting to be the bonds of the city of

Santa Cruz, but also certain other bonds, to the amount of $89,000.00, which were the bonds of a private corporation and not of the city of Santa Cruz (Rec., pp. 19-20, 26-7), and that, of the remainder of said indebtedness proposed to be refunded, all but $39,000.00 thereof was not a valid indebtedness of the city of Santa Cruz, but consisted of bonds illegally issued by said city for improvement purposes, and issued after the repeal of the only law authorizing the issuance thereof, and that there is no finding of fact that E. G. & E. Wallace were bona fide purchasers of the bonds and coupons assigned by them to plaintiff without notice, and that the findings of fact show that none of the assignors of plaintiff were such bona fide purchasers without notice, because the findings show that the recitals in said bonds and the face thereof (Rec., pp. 20, 21), taken in connection with the statute of which all purchasers were affected with notice, showed the invalidity of said refunding issue, and that the same were not issued in pursuance of the statute of 1893, or to refund an indebtedness of the city of Santa Cruz, evidenced by bonds or warrants thereof, and showed that the provisions of the statute had not been followed and complied with; and the notice of election and ordinance recited in said bonds also showed that said bonds were issued in part for an indebtedness not that of the city of Santa Cruz or evidenced by its warrants or bonds, and that the election had not been properly held in pursuance of the statute.

And said findings of fact show that said issue of $360,-

000.00 worth of bonds for refunding purposes was an over issue, and beyond the authority and power of the city officials to make (Rec., p. 19), in that the same, when issued, constituted an indebtedness greater than 15 per cent. of the assessed valuation of the real and personal property of said city; and said findings of fact show that said bonds were not sold, as required by the statute, to the highest bidder, or for not less than their face value, in the character of money in which they were payable; and said findings show that said bonds were not executed or issued by legal or proper officials of said city, in that the greater portion thereof were signed by one William T. Jeter after his term of office as mayor of said city had expired, and at a time when he was neither *de facto* nor *de jure* mayor of said municipality.

And the said findings of fact further show that said refunding bond issue was never issued by said defendant the city of Santa Cruz, but that the same was, by certain individuals pretending to act as members of the common council of said city, but who had no right or authority so to act, and who were, at the time, neither *de facto* nor *de jure* members of the common council of said city, unlawfully ordered to be delivered by the city clerk of said city to Coffin & Stanton under the terms of an illegal contract theretofore accepted by said individuals pretending to act as such common council without authority, as aforesaid.

And that said findings further show that the city was

not and could not be estopped from setting up, as against any purchasers of said bonds, the illegality and invalidity thereof, and that all the purchasers thereof were not purchasers in good faith and for value and without notice, but were affected with notice of the invalidity of said bonds, in that the authorities of said city had no jurisdiction, power or authority to submit any proposition to the voters of said city for the refunding of anything but a legal indebtedness of said city, and had no authority to issue said refunding bonds except for such legal indebtedness, and that such want of authority could not be concluded by any recitals in the bonds, and that all purchasers thereof, by the recitals in the bonds, were referred to the notice of election and to the ordinance recited in said bonds, and which were, and were required by law to be, matters of record in writing, and could easily have been ascertained upon the minutes and recorded proceedings of the city officials; and that the question whether such refunding bonds were issued to refund a valid indebtedness of the city was one not committed by law to the decision and determination of the city officials, but was a fact and condition precedent to the exercise of their power in the premises, and was a fact ascertainable by an inspection of said notice of election and of said ordinance, and of which all intending purchasers of said bonds were required to take notice at their peril.

That there is no finding of fact that said purchasers took said bonds in reliance of any of the recitals thereof or any representations made by the city officials, and, so

far as E. G. & E. Wallace are concerned, the findings show that they did not so rely, but instituted an independent investigation of their own and employed attorneys and agents to investigate into the facts of the issuance of said bonds and into the proceedings taken by the city officials in issuing the same (Rec., pp. 39, 40-1), and were informed by the opinions of their said attorneys of facts which rendered it their duty to pursue said investigations, and their said attorneys and agents, in the course of said investigation did have full and actual knowledge of the said notice of election and of the said ordinance recited in said bonds and of all the other facts concerning the issuance thereof, and such knowledge of such agents and attorneys was and became the knowledge of all purchasers of said bonds.

And said findings further show that all purchasers of said bonds had notice that the statute under which the same purported to have been issued conferred no authority upon the city officials to issue negotiable bonds which would have the effect of putting off defenses against the city or of estopping the city or precluding the city from setting up, as against such purchasers, the actual facts concerning the validity of said bonds.

(Error Assigned, Rec., pp. 297-9.)

XXXIII.

That the court erred in rendering judgment in favor of the plaintiff and against the defendant, because the find-

ings of fact do not support the judgment in this: That said findings show that no election was ever held in the city of Santa Cruz, or by the electors thereof, for the purpose of determining the question of issuing bonds to refund the outstanding indebtedness of said city, evidenced by bonds and warrants thereof, and that the findings further show that the bonds in question here were illegally issued, without the assent of two-thirds of the qualified electors of said city of Santa Cruz, or any number or portion of the qualified electors of said city of Santa Cruz, voting at an election held for that purpose, as required by Section 18 of Article XI of the constitution of the State of California.

(Error Assigned, Rec., p. 299.)

XXXIV.

That the court erred in rendering judgment in favor of the plaintiff and against the defendant upon the findings of fact made and filed herein, because the said findings of fact are insufficient to sustain the judgment in that the statute of the State of California, approved March 1, 1893, required that the election should be called and held in the same manner as other elections are held in such city or town, and that the notice of such election should recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued; and the findings show that the bonds in ques-

tion recited that they were issued under said statute and in pursuance of a special election called and held under said statute and in pursuance of an ordinance of the city of Santa Cruz calling said election and submitting said question of refunding to said electors, and that said notice of election and said ordinance were matters of public record required by law to be kept and open to the inspection of all, and such ordinance and notice of election were and constituted notice to all intending purchasers of the invalidity of said bonds, and of the fact that the city authorities, in passing said ordinance and calling said election, had proceeded without authority or jurisdiction, and that the indebtedness proposed to be refunded was not such indebtedness as said statute authorized to be so refunded, and was not an indebtedness of the said city of Santa Cruz (Rec., pp. 19-20, 26 to 39).

And said findings further show that no other recitals in said bonds could estop said city from setting up the facts aforesaid as against purchasers of said bonds, and that the decision of the question whether said indebtedness was the indebtedness of the city of Santa Cruz was not by law remitted to the determination of said city officials and could not be concluded by any recitals in said bonds.

(Error Assigned, Rec., pp. 299-300.)

XXXV.

That the court erred in rendering judgment in favor of the plaintiff and against the defendant upon the findings

of fact made and filed herein, because said findings are insufficient to support the judgment in that there is no finding of fact that E. G. & E. Wallace were bona fide purchasers of said bonds or purchasers thereof without notice.

(Error Assigned, Rec., p. 300.)

XXXVI.

That the court erred in rendering judgment in favor of plaintiff and against defendant upon the findings of fact made and filed herein, because the findings are insufficient to support the judgment in that the complaint alleges that the defendant, for value received, delivered the 360 bonds, with the coupons thereto attached, to one Walter Stanton, who afterwards, and before the maturity thereof, sold and delivered to the plaintiff herein the nine bonds of the first series, numbered from 1 to 9, both inclusive, and 282 of the coupons maturing on April 15, 1895, which allegations of said complaint were denied by the answer, and there is no finding upon said issues, and no finding that said bonds were so delivered to Walter Stanton, or that Walter Stanton afterwards sold or delivered the same or any thereof to the plaintiff herein.

(Error Assigned, Rec., p. 300.)

XXXVII.

That the court erred in rendering judgment in favor of plaintiff and against the defendant upon the findings of

fact made and filed herein, because the findings are insufficient to support the judgment in that there is no finding that the assignors of plaintiff were purchasers in good faith and for value, in that it is not found that such purchasers did not have notice of facts sufficient to put them upon inquiry as to the validity of said bonds, nor that such inquiry, if prosecuted with reasonable diligence, would not necessarily have resulted in the disclosure of the facts showing the invalidity of said bonds.

(Error Assigned, Rec., p. 300.)

XXXVIII.

That the court erred in rendering judgment in favor of plaintiff and against the defendant upon the findings of fact made and filed herein, because the findings are insufficient to support the judgment in this: That the findings show that the attorneys whose opinions were submitted to E. G. & E. Wallace and F. H. Prince & Company were the agents and attorneys of E. G. & E. Wallace, and that E. G. & E. Wallace, before purchasing said bonds, had actual notice that the said F. H. Prince & Company and the said attorneys had and had examined the ordinances and other proceedings recited in said bonds and had actual knowledge of all the facts showing the invalidity of said refunding issue, and that the knowledge of said attorneys and of said agents was the knowledge of the said E. G. & E. Wallace (Rec., pp. 39, 40-1).

(Error Assigned, Rec., pp. 300-1.)

XXXIX.

That the court erred in redering judgment in favor of plaintiff and against defendant upon the findings of fact made and filed herein, because the findings are insufficient to sustain the judgment for the reasons and in the particulars assigned and specified in Assignments of Error Nos. 47, 48, 49, 50, and 51, as set forth in the record herein on pages 290 to 297.

(Error Assigned, Rec., p. 301.)

XL.

That the court erred in rendering judgment in favor of plaintiff and against defendant upon the findings of fact made and filed herein, because the findings do not support the judgment in that it appears from said findings that on March 13, 1894, the defendant had an outstanding bonded indebtedness of $271,000, which indebtedness had been incurred in the acquirement of public improvements by said city of Santa Cruz (Rec., pp. 19, 26, 29, 34-5).

And the findings further show that the issuance of the refunding bonds in question created an indebtedness in excess of the limitation imposed by the act of the legislature of the State of California, approved March 11, 1891 (Rec., pp. 19, 26, 29, 34-5), which said act provides that no city, town, or municipal corporation shall incur an indebtedness for public improvements which shall in the aggregate exceed 15 per cent. of the assessed value of

all taxable real estate and personal property of such city, town, or municipal corporation (Stats. of 1891, p. 84).

(Error Assigned, Rec., p. 301.)

XLI.

That the court erred in rendering judgment in favor of plaintiff and against defendant upon the finding of fact made and filed herein, because the findings are insufficient to support the judgment in this: That the findings show that, apart from the question of estoppel by recitals and the rights of a bona fide purchaser for value before maturity, the bonds were invalid and constituted no obligations of the city on account of the failure to comply with the conditions upon which, under the statute pursuant to which they purport to have been issued, such bonds could be issued, and no authority existed under the laws of California on the part of such municipalities as the defendant to issue negotiable bonds, and by the law of California the issuance of such bonds is not within the scope of the general and ordinary powers of the municipality, and such bonds can be legally issued only by express authority of the legislature. All who deal in such bonds are bound to know the authority under which and in pursuance of which they were issued, and are bound at their peril to know that the mode prescribed for the issuance of valid municipal bonds was in fact followed in the issuance of the bonds in which they are dealing, and they are not permitted to

rely even upon the recitals contained in the bonds, and that want of authority in municipal officers cannot be supplied by their unauthorized acts or representations, and that, in this case, as the findings show, there was no authority to make this refunding issue, and the indebtedness proposed to be refunded was not a valid city indebtedness evidenced by its bonds or warrants (Rec., pp. 19, 26, 29, 30, 34), and the election was not legally held according to statute (Rec., pp. 19, 20, 32-3, 39), and the bonds were not sold and issued in the mode prescribed by the statute (Rec., pp. 20 to 23-4), no recitals in the bonds and no decision or determination by the city officials could give validity to the issue or estop the city from setting up, even as against bona fide purchasers, the invalidity of the bonds, and, by the laws of California, every person dealing in such municipal bonds is bound at his peril to inquire whether they were issued in the mode prescribed, and, as the mode is the measure of the power, the bonds are void in the hands of a holder for value without actual notice; and by the laws of California the officers authorized to issue these bonds upon the conditions prescribed in the statute were not the appointed tribunal to decide the fact which constitutes the condition, and, consequently, their recitals will not be accepted as a substitute for proof.

That by the law of the State of California, municipal bonds are assignable contracts merely and subject, in the hands of holders, to all the equities existing in favor of

the municipality issuing such contracts; that there is no constitutional or statutory authority in the State of California conferred upon the officers of municipalities to make such recitals as those contained in these bonds; that those officials have given them by statute simply power to do certain acts and make those acts matters of public record as required by law; having done so, their functions with respect to them and their legal effect cease. They have no power to determine the result of any special election on the question of issuing bonds or contracting indebtedness. They were not authorized to bind the city of Santa Cruz by any statement which they might make concerning such election or concerning the results of such election, nor to determine whether such election was duly or legally called, or held, or conducted, nor to determine whether notice of such election was duly or legally given or published as required by law, nor had they any power to certify or declare that all or any of the acts, conditions, or things required by law to be done precedent to the issue of the bonds in question, or of any bonds, were properly done, or properly happened, or were properly performed in legal or due form as required by law. These recitals, being neither authorized by law nor matters within the power of determination of the city officials, the city is neither concluded nor estopped in any manner by such recitals.

(Error Assigned, Rec., pp. 301-2.)

PART THIRD.

BRIEF OF ARGUMENT.

I.

THE JUDGMENT OF THE CIRCUIT COURT, IN FAVOR OF THE PETITIONER AND AGAINST RESPONDENT, WAS PROPERLY REVERSED BY THE CIRCUIT COURT OF APPEALS, BECAUSE THE FINDINGS OF FACT OF THE CIRCUIT COURT UPON WHICH THE JUDGMENT WAS BASED SHOW THAT THE BONDS AND COUPONS IN QUESTION, AND EACH AND ALL OF THEM WERE INVALID AND VOID, IN THIS: THAT SAID BONDS AND COUPONS WERE IN PART ISSUED FOR AN UNLAWFUL PURPOSE, NAMELY: TO REFUND THE DEBT OF A PRIVATE CORPORATION; THAT THE FACTS SHOWING SUCH INVALIDITY WERE MATTERS OF PUBLIC RECORD OPEN TO PUBLIC INSPECTION AND REQUIRED BY THE LAWS OF THE STATE OF CALIFORNIA TO BE SO MADE MATTERS OF PUBLIC RECORD AND TO BE ENTERED AND KEPT "IN LARGE, UNIFORM, WELL BOUND, AND SUITABLE BOOKS," SO OPEN TO PUBLIC INSPECTION *(Findings Nos. 3, 5, 6, 8, 10, and 15, Rec., pp 18 to 23, 24, 26; Additional Findings Nos. 1 and 2, Rec., pp. 27, 34; Error No. 49, Rec., pp. 292-3-4-5; Error No. 50, Rec., pp. 296-7; Error No. 51, Rec., p. 297; Error No. 52, Rec., pp. 297-8; Error No. 54, Rec., pp. 299, 300; Error No. 59, Rec., p. 301; Error No. 61, Rec., pp. 301-2).*

Specifications, Supra pp. 96 & 121.

The decision of the United States circuit court of appeals, which is here in question, is based upon the findings of the trial court that: (1) the municipal bonds and coupons in question were issued, in part (indistinguishable), to refund the debt of a private corporation (Rec., pp. 18, 20, 26-7, 34); (2) that the facts showing the said purpose for which said bonds were in part issued were matters of public record (Rec., pp. 19, 20, 26-7, 34); (3) the laws of California requiring those very facts to be made matters of public record, open to public inspection (Stats. Cal., 1893, p. 59; Stats. 1875-6, p. 203), and (4) the laws of California rendering the act of issuing bonds to refund such debts invalid and void (Const. Cal., Art. XI, Sec. 18, Henning's Edition, pp. 171-2; Stats. Cal., 1875-6, p. 193, Sec. 10; Stats. Cal., 1893, p. 59).

The decision of the circuit court of appeals is ably sustained in the prevailing opinion of that court, which is printed in full in the transcript of record herein, at pages 309 to 316, to which we invite the careful consideration of this Court.

We desire, at this point, to call attention, particularly, to the following language of the court, in that opinion:

"The federal courts have always protected with a firm "hand the rights of bona fide creditors of municipal cor- "porations, uniformly holding that the bonds issued by "such corporations under granted power, negotiable in "form, are valid in the hands of a bona fide holder, not- "withstanding irregularities in their issue, or even in

" the non-performance of prior conditions, where the de-
" termination of the facts of such performance are by
" the law left to the determination of the municipal offi-
" cers, and they incorporate in the bonds which are put
" upon the market proper recitals of such performance.
" The obvious reason for this is, that where the law under
" which such securities are authorized to be issued com-
" mits to the municipal representatives the determina-
" tion of the conditions precedent, and those representa-
" tives recite upon the face of the bonds such perform-
" ance, common honesty demands that the municipality
" be estopped to deny the truth of the recitals as against
" the bona fide purchaser of the bonds. But it is equally
" well settled that where the power to issue such bonds
" did not exist, or where the law under which they are
" issued requires certain facts to be made a matter of
" record, open to the inspection of every one, there can
" be no implication that it was intended to leave such
" facts to be determined by the officers charged with the
" duty of issuing the bonds and conclude by their recit-
" als, contrary to the facts so recorded (*Sutliff* vs. *Lake*
" *County Commissioners*, 147 U. S., 230; *Dixon County*
" vs. *Field*, 111 U. S., 83). * * *

"It will be noticed that there is in this act no express
" grant of power on the part of the municipal authori-
" ties to issue any bonds. There is an implied power;
" but the implication is, not to issue bonds for any and
" all purposes, but refunding bonds with which to take

"up the outstanding bonds and warrants of the city, "provided a majority of the qualified electors of the city "should so vote, upon the submission of the question to "them in the mode prescribed by the act. Whether the "then outstanding indebtedness of the city should be "refunded or not, was not left to the determination of "the municipal authorities, but they were by the statute "empowered to submit that question to a vote of the "qualified electors of the city, specifying in the notice of "election the indebtedness to be refunded, together with "all details of the proposed issue. The power thus con- "ferred on the mayor and council could only be exercised "at a meeting of the municipal board. Such bodies can "only act by order, ordinance, or resolution, as every "one is bound to know (*Wesson* vs. *Saline*, 73 Fed. Rep., "919; *15 Am. & Eng. Ency. of Law*, pp. 1028, 1029, 1030, "and cases there cited). In the present instance, the "action of the mayor and council was by ordinance, as "appears from the findings of the court below. Such "ordinance was a part of the public records of the city, "which by its charter are required to be kept 'in large, "'well bound, uniform, and suitable books' (Stat. 1875- "1876, p. 203).

"The indebtedness of the city, thus evidenced by its "outstanding bonds and warrants, and proposed to be "refunded by the issuance of other bonds, the act of "March 1, 1893, authorized the mayor and common "council of the city to specify, together with the details

"of the proposed issue, and submit the question of re-
"funding the specified indebtedness, upon the desig-
"nated terms, to the qualified electors of the city for de-
"termination. In the event the majority of the votes
"should be in favor of the proposition, then the muni-
"cipal authorities were impliedly empowered to issue
"refunding bonds therefor, but for no other purpose.
"The public record which the act of March 1, 1893, taken
"and read, as it must be, in connection with the charter
"of the city, required to be made by order, ordinance,
"or resolution, disclosed to all the world the specific in-
"debtedness that it was proposed by the municipal
"authorities to refund, and in respect to which the quel-
"ified electors of the city were called upon to vote. The
"officers impliedly charged with the issue of such re-
"funding bonds were not in any manner authorized to
"make any certificate or representation to prospective
"purchasers in respect to the character of the indebted-
"ness evidenced by outstanding bonds or warrants of
"the city in lieu of which the refunding bonds were
"authorized to be issued. On the contrary, the statute
"itself was clear notice to every person that upon the
"records of the governing body of the city was required
"to be entered the specific indebtedness proposed to be
"refunded, together with the details of the proposed is-
"sue of refunding bonds, and that it was only for such
"specified indebtedness that any refunding bonds could
"be issued. To that record every purchaser was re-

"ferred by the very act under which alone the bonds in "suit were issued. The notice of election directed by "this act to be prescribed by the mayor and common "council of the city, occupies substantially the same "position that the resolution did in the case of *Lehman* "vs. *City of San Diego,* which was lately before this "court, and is reported in 83 Fed. Rep., 669.

"The present case is, we think, clearly within the doc- "trine of that case, and of *Sutliff* vs. *Lake County Com-* "*missioners, supra,* and *Dixon County* vs. *Field, supra,* "and kindred cases, and must be ruled by them."

The foregoing views and conclusions of the circuit court of appeals are fully supported by the findings of the trial court, the statutes of California, and the authorities.

It is well settled that a municipality has no power to issue negotiable bonds, except upon statutory authority and subject to the restrictions and directions of the enabling act.

Aetna Life Ins. Co. *vs.* Lyon Co., 44 Fed., 329.
Young *vs.* Clarendon Tp., 132 U. S., 340.
Merrill *vs.* Monticello, 138 U. S., 673.
Hedges *vs.* Dixon Co., 150 U. S., 182.
Concord *vs.* Robinson, 121 U. S., 165.
Daviess County *vs.* Dickinson, 117 U. S., 657.

See, also, opinion of DeHaven, J., in this case (Rec., p. 52, Sub. 4).

"When the law confers no authority to issue the bonds "in question, the mere fact of their issue cannot bind "the town to pay them, even to a purchaser, before ma- "turity and for value."

Hopper *vs.* Covington, 118 U. S., 148.
Marsh *vs.* Fulton Co., 10 Wall., 676.
East Oakland *vs.* Skinner, 94 U. S., 255.
Buchannan *vs.* Litchfield, 102 U. S., 278.
Dixon Co. *vs.* Field, 111 U. S., 83.
Hayes *vs.* Holly Spring, 114 U. S., 120.
Daviess Co. *vs.* Dickinson, 117 U. S., 657.
Merrill *vs.* Monticello, 138 U. S., 673.
Dillon on Mun. Cor., par. 89.

The refunding act in question (Stats. Cal., 1893, pp. 59, 60) restricts the refunding therein authorized, to the "*outstanding indebtedness of the city, evidenced by* "*bonds and warrants thereof.*"

It is now firmly established that municipalities will not be estopped by recitals contained in the bonds, unless the recitals relate to matters of fact which it may be fairly presumed that the officers of the municipality were left to determine.

Town of Coloma *vs.* Eaves, 92 U. S., 484, 490.
Dixon County *vs.* Field, 111 U. S., 83.
Lake County *vs.* Graham, 130 U. S., 674.

National Bank of Commerce *vs.* Town of Granada, 10 U. S. App., 692.

It is also well settled that recitals cannot be relied upon as an estoppel where the facts recited are matters of public record and are open to the inspection of every one who is disposed to make inquiries.

Sutliff *sv.* Lake Co. Commissioners, 147 U. S., 230.
Dixon County *vs.* Field, 111 U. S., 83.
Nesbitt *vs.* Riverside Ind. Dis., 144 U. S., 610.
Northern Bank of Toledo *vs.* Porter Tp. Trustees, 110 U. S., 608, 615.
Valley County *vs.* McLean, 49 U. S. App., 131.
Dudley *vs.* Board, 49 U. S. App., 336.

U.S. Tr. Co. v Vil. of Minn. Ridge 144 3.

The outstanding indebtedness of the city of Santa Cruz is a matter of record; the books of the city treasurer must show at all times what bonds of the city are outstanding; the ordinance record of said city required by law to be kept is open to all who may wish to know what bonds have been issued by the city. The charter of the city provides (Sec. 40, p. 204, Stats. of Cal., 1875-6, that the city clerk, at the end of the fiscal year, "shall make a full and detailed statement of the re-"ceipts and expenditures of the city during said year, "specifying the different sources of revenue and the "amounts received from each, the several appropria-"tions made by the common council, and the objects

"for which they were made, and the amount of money "expended under each, *evidences of indebtedness issued*, "and what portion thereof remains outstanding, with "the rate and amount of interest due thereon and the "amount of cash on hand."

To these records the common council and the public alike must go to ascertain the amount and character of the outstanding indebtedness of the city. Moreover, the act of 1893, under which the alleged refunding bonds were attempted to be issued, expressly provides that the notice of election shall recite, "*the indebtedness "to be refunded.*" This notice was by statute intended to be a record open to the world, disclosing the nature of indebtedness proposed to be refunded; and, if it appears therein (as it did in this case) that the refunding issue was to refund not only the bonds of the city, but the bonds of a private corporation as well, no false recital in the bond can be relied upon to cure the defect thus formally recited in a public record.

It was said by the Supreme Court of the United States, in Sutliff *vs.* Lake County Com., supra: "Upon "these facts, in the light of the previous decisions of "this Court, it is clear that the plaintiff, although a "purchaser for value and before maturity of the bonds, "was charged with the duty of examining the record of "indebtedness provided for under the statute of Colo- "rado, in order to ascertain whether the bonds in- "creased the inebtedness of the county beyond the con-

"stitutional limit, and that the recitals in the bonds "did not estop the county to prove by the records of "the assessment and the indebtedness that the bonds "were issued in violation of the constitution.

"In those cases in which this court has held a muni- "cipal corporation to be estopped by recitals in its "bonds, to assert that they were issued in excess of the "limit imposed by the constitution or statutes of the "State, the statutes as construed by the court, left it to "the officers issuing the bonds to determine whether the "facts existed which constituted the statutory or con- "stitutional conditon precedent, and did not require "those facts to be made a matter of public record.

"But if the statute expressly requires those facts to "be made a matter of public record, open to the inspec- "tion of every one, there can be no implication that it "was intended to leave that matter to be determined "and concluded contrary to the facts so recorded by "the officers charged with the duty of issuing the "bonds."

Again, in Dixon County *vs.* Field, supra, the Supreme Court said: "If the fact necessary to the existence of "the authority was by law to be ascertained, not offi- "cially by the officers charged with the execution of "the power, but by reference to some express and de- "fined record of a public character, then the true mean- "ing of the law would be that the authority to act at "all depended upon the actual objective existence of

"the requisite fact as shown by the record, and not "upon its ascertainment and determination by any "one, and the consequence would necessarily follow "that all persons claiming under the exercise of such "power might be put to the proof of the fact, notwith- "standing any recitals in the instrument."

Following the reasoning of the Supreme Court in the Dixon County case, it must be held that while the common council of the city of Santa Cruz were bound, it is true, to learn from the records of the city what the limit upon their authority was, and what bonds of the city of Santa Cruz were outstanding, as a necessary preliminary in the exercise of their functions and the performance of their duty, yet the information thus obtained was for themselves alone. "All the world besides "must have it from the same source and for themselves. "The fact, as it is recorded, * * * is extrinsic, and "proves itself by inspection, and concludes all determi- "nations that contradict it."

Where the statutes of a State (as in California) provide that municipal corporations shall have power to make and publish from time to time ordinances providing for the method of binding municipal corporations regarding the issuing of bonds, the holder of negotiable bonds purporting to have been issued by such a corporation under the provisions of such statutes is bound to

know independently of the recitals in the bond that there is such an ordinance in existence.

> Hinkley *vs.* Arkansas City, 32 U. S. Appeals, 640.
> See, also, Dudley *vs.* Board of County Comrs., 49 U. S. App., 336, and Valley Co. *vs.* McLean, 49 U. S. App., 131.

The bonds having been issued, in part for an illegal purpose, and as it is impossible to segregate or distinguish the valid from the invalid bonds, the whole issue is void.

> Aetna Life Ins. Co. *vs.* Lion Co., 44 Fed., 329.
> Hedges *vs.* Dixon Co., 150 U. S., 182.
> Coffin *vs.* Indianapolis, 39 Fed., 221.

U.S. Tr. Co. v. Vil of Mun. Ridge, 104 3

The enabling act under which the bonds in question were issued required notice of election to be given by the mayor and common council (Stats. of California, 1893, p. 59). This notice was made jurisdictional by said act, which provided that such notice should recite the indebtedness to be refunded, together with all details of the proposed issue. This power could be exercised in one mode only, to wit, by proceedings duly held at a meeting of the mayor and common council duly assembled as a board and spread upon the public records as a permanent record of a public character and open to the inspection of all. This results from the provisions of the enabling act of 1893, construed and read as it must be in connec-

tion with the charter of the city of Santa Cruz (Stats. of California 1875-1876, pp. 189-207).

There is no other conceivable way in which the notice of election specified in the statute could be given. The mayor and the council must give it and provide for it, and they must do it officially and in the manner provided by the charter, to wit, by ordinance, for in no other way could they act or proceed.

Jersey City *vs.* Central, etc., 40 N. J. Eq., 419.
People *vs.* Bailache, 52 Cal., 310.
Dey *vs.* Mayor, 19 N. J. Eq. P., 416.
Schumm *vs.* Mayor, 24 N. J. Eq. P., 153.
15 Am. & Eng. Encyp., pp. 1028, 1029.
Stevenson *vs.* Bay City, 26 Mich., 46.
Talcott *vs.* Noell, 78 N. W., 39, 40.
Lehman *vs.* San Diego, 83 Fed., 670.
Wasson *vs.* Saline, 73 Fed., 919.

The ordinances of the mayor and common council were public records, required to be kept "separately, in "large, well-bound, uniform, and suitable books" (Stats. California 1875-1876, sec. 40, p. 203); such an ordinance was so adopted, recorded, and kept as a public record (findings, Rec., pp. 18, 19, 20, 21, 26, 39; opinion of circuit court, Rec., p. 52, sub. 4).

This brings the case at bar directly within the rule laid down in Lehman *vs.* San Diego, 83 Fed., 670; Dixon *vs.* Field, 111 U. S., 93 and Sutliff *vs.* Board, 147 U. S., 230,

and takes it out of the category of Hackett *vs.* Ottawa, and other cases relied upon by petitioner.

Suppose the statutes of 1893 had been worded thus:

"The governing body of any city or town having an "outstanding indebtedness, evidenced by bonds and war- "rants thereof, shall have power to pass an ordinance "and enter the same in its ordinance record, which shall "consist of large, well-bound, uniform and suitable "books, kept at all times open for public inspection, call- "ing, and prescribing the form of notice of, an election "to determine the question of refunding such indebted- "ness. Such notice shall recite and describe the par- "ticular bonds or warrants to be refunded, together with "the denomination, character, time of payment, rate of "interest, as well as all other details of the bonds pro- "posed to be issued; and such recital and description "shall fix the denominations of the refunding bonds at "not less than $100 and not more than $1,000, and the "principal and interest as payable in coin or currency "at the office of the treasurer or some designated bank, "such interest not exceeding 6 per cent. per annum. If "the requisite vote be in favor of refunding the indebted- "ness recited in said ordinance and notice, the bonds "specified and described in said notice and ordinance "shall be sold by said governing body to the highest bid- "der for not less than their face value."

If such had been the statute, the question before the court would be exactly the same.

Now, reading the statute with the charter, we have the statute supposed.

In other words, the legislative authority under which these bonds were issued is just what it would have been under the statute supposed, and we have a case legally identical with Lehman *vs.* San Diego. The acutest and most subtle metaphysics cannot draw a distinction between a statute authorizing the officials of a town to issue or sell *the bonds* specified, recited, or described in an ordinance already passed and recorded and a statute giving them power to issue or sell *the bonds* described, recited, or specified in an ordinance thereafter to be passed and recorded and thereby authorized.

The unsubstantial and only distinction between Waite *vs.* Santa Cruz and Lehman *vs.* San Diego is that in the latter the governing body of the municipality, without previous authority, enacted an ordinance providing for the issuance of certain specified, described, and recited bonds in a specified mode and upon certain declared conditions, and the legislature afterward ratified, confirmed, and made valid the ordinance, while in the former the legislature, in advance, enacted that the governing body should have power to enact a similar ordinance, and, on its ratification by the electors, might issue those specified, described, and recited bonds in the mode and upon the conditions set forth, recorded, and made certain in and by the terms of the ordinance, provided, however, that the ordinance should show on its face that the bonds to be issued were refunding bonds issued to take up pre-

vious indebtedness evidenced by bonds or warrants *of the city.*

It is obviously immaterial whether the legislature ratifies the ordinance, as in Lehman *vs.* San Diego, or authorizes it in advance, as in this case. The ratification is the equivalent, and cannot be more than the equivalent, of previous authorization. The substantial points of resemblance, or, rather, of absolute legal identity, between the two cases cover the whole ground of debate. In neither was there given or conferred by the legislature any *general* power to issue bonds, coupled with conditions on the exercise of the power, the right to determine the existence of which conditions rested *in pais* or in parol and was committed to the decision of the governing body either expressly or by any implication.

It was frankly and properly conceded at the oral argument of this case before the circuit court of appeals that Lehman *vs.* San Diego was properly decided and was but a corollary of Dixon *vs.* Field. But why is this necessarily so? Because the principle established in Dixon *vs.* Field, 111 U. S., 83, and Sutliff *vs.* Board, 147 U. S., 230, and kindred cases, is that if the statute *expressly* requires the facts constituting the condition precedent to the authority to issue the bonds to be made a matter of public record, open to the inspection of every one, *there can be no implication* that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

In Lehman *vs.* San Diego the statute did expressly require the facts to be made a public record simply because under the statute the facts were required to be contained in the proceedings of the board. The ordinance ratified gave the board authority to issue the bonds when and to whom such board *might by resolution direct.* The court said: "Under the terms of the ordinance, no bond could "be issued or delivered except upon a resolution of the "board, *appearing upon its minutes or the records of its "proceedings*, thus furnishing a most important safe-"guard against fraud and an abuse of power. Every "person dealing in the bonds is bound, at his peril, to in-"quire whether they were issued in the mode pre-"scribed."

Lehman *vs.* San Diego, 83 Fed., 637.

That is, under the statutes and laws of California and by intendment and construction of law, a statutory requirement that a certain fact thall be embodied in a resolution or ordinance is an express requirement that it be made a matter of public record, open to the inspection of every one.

So, in Wesson *vs.* Saline, 73 Fed., 919, it is said: "Common councils, boards of commissioners, and like "municipal bodies can act only by order, ordinance, or "resolution, as every one is bound to know."

Consequently when a statute, as in the Lehman case, refers to an ordinance or resolution it means *ex vi termini*, something appearing on a public record, and by a

perfect parallelism the statute in this case (of 1893), by its reference to the notice of election, enacts and provides for a public record. The notice of election could be framed and devised only by the mayor and common council, and their acts must appear of record. This must be so on general principles, for in no other way can such bodies act at all; but in this case, as in the Lehman case, we need not rest the proposition on general principles alone. The statute of 1893, by the very act of directing certain action to be taken by the mayor and common council, incorporated into the statute the charter of Santa Cruz, prescribing in detail the mode and manner in which alone they could act, and consequently must be construed and read precisely and exactly as if it had said in so many words that the bonds could only be issued to refund an indebtedness of the city, *evidenced by bonds and outstanding warrants thereof, specifically recited and described in an ordinance spread on the records and minutes and transcribed and kept open for public inspection in large, legible, and well-bound books, etc.*

"The city clerk must keep separately, in large, well-"bound, uniform, and suitable books, an ordinance rec-"ord, in which shall be entered, in a good, round, legible "hand, all the ordinances passed by the common council, "and approved by the mayor of the city of Santa Cruz, "and said record shall be signed by the mayor and "countersigned by the city clerk of said city" (charter city of Santa Cruz, Stats. of Cal. 1875-1876, p. 203, sec. 40).

In this case, even if possible, more studiously and effectively than in the Lehman case, every feature of the legislation portrays the prevailing and controlling intention and purpose to interpose as a shield between the municipality and those dealing with its agents the important "safeguard against fraud and abuse of power" of a public and definite record, *expressly required by law*, and containing on its face the imperishable and unmistakable evidence of the jurisdiction of the officials, their compliance with their only letter and warrant of authority or their disregard of its limitations and conditions.

For these reasons and because there was no thought or wish to confer a general power to issue bonds and then to superadd conditions *in pais* determinable finally by the officials and concluded by their recitals as by the judgment of a court, the statute is mainly and in all substantials restricted and confined to and deals with matters not resting *in pais* and to be ascertained by perishable evidence in each given case, but with matters intrinsically and necessarily of record and ascertainable and determinable as well and as easily by intending dealers and purchasers as by the city officials.

There is no power given to refund the city indebtedness generally, but strictly and only that indebtedness the evidence of which must appear and can only appear by the written and recorded action of the council; and, then, carrying out the design, the notice of election is not, as usual, left to the will, discretion, or caprice of the

officials, but must conform to the statute and distinctly specify the very writings and records evidencing the debt, and the very bonds in every detail which, and which alone, can be issued and sold.

In this particular case the point is made still clearer, if possible, by the course pursued. It must be admitted that on one proposition the law is settled—that is, that no recitals can control or estop the municipality in regard to matters appearing on the face of the bonds. In the Sutliff case (147 U. S., 230), the statute required the officials, in submitting the question to the voters, to enter of record an order specifying the amount required, etc., and the court said that it was clear that the plaintiff, though a purchaser for value and before maturity, was charged with the duty of examining the record provided for in the statute in order to ascertain whether the bonds increased the indebtedness beyond the limit, and "that the recitals in the bonds did not estop the county "to prove by the records * * * that the bonds have "issued in violation" of the authority, etc., and that in such case there was no implication of authority in the officials to conclude the matter contrary to the facts so recorded.

Now, here, by a perfect parity of reasoning, the statute of 1893 required the officials, in submitting the question to the voters, to enter of record a statement specifying the indebtedness to be refunded, etc., and equally all purchasers were bound to examine that record in order to ascertain whether the specified indebtedness was such

as could be refunded, etc., and no recitals could estop or conclude in that regard. But there has never been any doubt as to whether a statement made or fact appearing on the face of the bonds, whether required to be made by statute or not, prevents a purchaser from relying on recitals to the contrary of that fact if true; and so in the Sutliff case and other cases, some of which are there cited, it is held that when the amount of the bonds is stated on their face, that is sufficient to notify the purchaser. If, in this case, the notice of election had been copied into the bond in full, and so the bond had shown on its face its utter invalidity, it would not be, and is not contended there could be, any recovery. In such case, as, by necessary implication, is laid down in the Sutliff case, the purchaser is required to know the facts contained in the records required by law to be made, and also whatever facts are stated on the face of the bond; and if, by putting both together, he can ascertain or must know that the officials have exceeded their power, he cannot recover; and in Chaffee *vs.* Potter, 142 U. S., 363, it is expressly said: "If the face of one of the bonds had "disclosed that, as a matter of fact, the recital in it, with "respect to the constitutional limit, was false, of course "the county would not be bound by that recital, and "would not be estopped from pleading the invalidity of "the bonds in this particular."

So in Oxford *vs.* McClure, 4 Otto, 429, it is said: "These bonds, therefore, carried on their face unmistak-

"able evidence that the forms of law under which they "purported to have been issued had not been complied "with. * * * If a purchaser may be, as he some- "times is, protected by false recitals in municipal bonds, "the municipality ought to have the benefit of those that "are true."

The bonds in suit show on their face two things that are true: First. That they are issued for the purpose of refunding *bonded* indebtedness. Second. That they are issued in pursuance of and in conformity with *ordinances* of the city and of a notice of election given as required by the statute, and therefore reciting the indebtedness refunded.

Taking, then, the statute and the face of the bond together, as he must, the purchaser is charged with knowledge that it was only bonds and not warrants that were attempted to be refunded; that the election was called by *ordinance*, and that the ordinance recited and specified the particular bonds, and was made a public record accessible to all, and kept in large, well-bound books, and also (though this is not essential here) that there were like public records, by reference to which he could ascertain whether the bonds recited were outstanding.

Another correspondence between this and the Lehman case is that in both the courts are to construe statutes of California and administer them in the light of the previously settled jurisprudence and course of decisions in California. In the late case of O'Brien *vs.* Wheelock, 95

Fed., 905, in which the opinion was written by Mr. Justice Harlan, it was laid down that although the act under which these bonds were issued may not have been the subject of judicial construction (by the State Court) before the rights of the plaintiff accrued, this court should give effect *to any rules of construction* that may have been previously established by the highest court of the State when interpreting similar provisions in other statutory or constitutional enactments.

Now in Sutro *vs.* Pettit, 74 Cal., 334, decided in 1887, a statute of 1870 had authorized the supervisors to issue bonds "not exceeding in the aggregate the sum of $40,-"000," and provided for a register of said bonds to be made of record. The supervisors, as the record in that case shows, issued four hundred and twenty bonds of one hundred dollars each, making, of course, an overissue of two thousand dollars. Those bonds recited that they were issued under the statute of 1870, and there was nothing on the face of each bond to show the amount of the total issue. These bonds were in form negotiable and interest was paid on them for several years, and on the first day of January, 1880, they were outstanding and unpaid.

Then a statute, of which, in some respects, the statute under which the bonds in suit in this case is a literal copy, was enacted, providing that the supervisors of any county having an outstanding indebtedness *evidenced by bonds or warrants thereof*, might refund the same, etc.,

and in supposed accordance with such provision new bonds were issued and sold.

A suit was brought by holders of the old bonds to compel the treasurer to pay them out of the proceeds of the new. The treasurer had paid the old issues from 1 to 400, but refused to pay those numbered from 401 to 420.

Prior to the reissue the supervisors passed a resolution declaring all the old bonds valid.

It was argued for the plaintiff that the determination of the supervisors was final and conclusive as to the validity of the bonds; that they were not void, and that power was given to issue them, and that there was nothing on the face of the bond showing it to be an overissue, and no accessible record showing the amount issued under the act, and that even if the bonds, as such, were invalid, the action of the supervisors in refunding them cured the defect.

For the defendant, it was argued that the supervisors had only the power expressly conferred or necessarily implied, and the bonds being an overissue were void, *even as to bona fide purchasers;* that as the bonds referred to the statute, the holder had notice of the terms of the statute. The court held that the decisions giving conclusive effect to recitals on the theory that the final determination of the truth of the recitals had been committed to the municipal authorities—a theory which underlies and is essential to the position of counsel for the present plaintiff and all the cases they rely upon—had no applicability or effect. That the validity of the

bonds "did not depend upon any fact—any matter *in* " *pais*—to be determined by the supervisors." That the power to issue the bonds, and the limitation of the power, depended wholly upon the language of the statute, and nothing was left to the decision of the officers. That neither the doctrine of estoppel, or of ratification, or of *bona fide* holding could be invoked. That in California the issuance of bonds is not within the scope of the general and ordinary powers of a board of supervisors, and that such bonds can only be issued by virtue of *express* authority of the legislature; and that the slightest inquiry would have disclosed the worthlessness of the bonds. That an overissue of twenty thousand dollars would have been no less valid than the overissue of two thousand dollars; and that any other rule than the rule of strict construction and denial of implied authority to recite away the limitations of the authority conferred, would put the people of the municipality in the complete power of careless or unscrupulous public officers; and that "*the character of one void act of public* " *officers cannot be changed by a second void act of the* " *same officers declaring the first acts to be valid.*"

This, we submit, was a direct adjudication settling and promulgating the law of California on the vital and controlling question under discussion on this branch of this case. A decision and enunciation long antedating the transaction in question and never since questioned or qualified. So that in strict accordance with what Justice Harlan said in O'Brien *vs.* Wheelock, 95 Fed., p.

906, when the statute under which the bonds in suit were issued was passed, and when the bonds were issued and when they were purchased, every one had notice that by the settled course of decision in California, even a statute expressly conferring the power to refund, and not, like that of 1893, giving no *express* power to do anything but *make up a record* of the action of the electors or some other body or tribunal, and couched in the same language, to wit, "having an *outstanding indebtedness evi-* "*denced by bonds* or warrants thereof," does not fall within the "line of judicial decisions in cases where the "validity of municipal bonds depended on the happening "of some precedent contingency of fact, and the ques- "tion was, whether the officers executing the bonds were "vested with the discretion or power to determine if the "contingency had happened. * * But * * the "validity of the bonds * * did not depend upon any "fact—any matter *in pais*—to be determined by the su- "pervisors (or other officials); * * there was noth- "ing left to the discretion of the officers, etc."

Sutro *vs.* Pettit, 74 Cal., pp. 335-6.

Again, in McCoy *vs.* Briant, 53 Cal., 247, it is laid down as the California doctrine that "*every person deal-* "*ing in bonds is bound, at his peril, to inquire whether* "*they were issued in the mode prescribed; and as the* "*mode is the measure of the power, the bonds would be* "*void in the hands of a holder for value, without actual* "*notice, if issued in any other mode.*"

This enunciation is in perfect harmony with that in Sutro *vs.* Pettit; and applying it to the facts here, it may be said, as was said there, concerning the resolution, that the requirement of a specification of the bonds in the notice of election cannot be regarded as merely directory, but, on the contrary, was intended as a precaution against an abuse of the power granted. Construing the statute of 1893 in the light of this doctrine, as was done with the statute in the Lehman case, how can the conclusion be reached that it was the intention of the legislature to commit to the city officials the power to decide whether the bonds refunded and recited in the notice of election constituted indebtedness of the city *evidenced* by bonds *thereof*, or to conclude by any recitals the question whether the limited and implied power so grudgingly conferred had been followed or exceeded, or the mode presented disregarded? By adopting the language of the statute construed in Sutro *vs.* Pettit, it is elementary law that the construction was adopted with the language, and every variation between that statute and the statute of 1893 but strengthens the argument against the propriety of putting on the statute of 1893 any more latitudinarian construction.

Clark *vs.* Town of Northampton, 105 Fed., 312, furnishes a very recent and pointed illustration of our position in this behalf. There, in answer to the position that the *bona fide* holder of municipal bonds should not be required to go beyond the determination of the officials

charged with the execution of the statute, it was said that the proposition seemed to be sustained by a long line of Federal adjudications, such as City of Evansville *vs.* Dennett, 161 U. S., 434.

But in deference to the *prior* settled course of state adjudication, the bonds were held invalid.

It has been said in the cases in the Supreme Court of the United States decided before Dixon *vs.* Field established the correct, if not a new, rule (see opinion of Brewer, J., in Polton *vs.* Board, 33 Fed., 615) that if it be the law that certain facts must appear, the question is: To whom must they appear and when? Who is to decide? etc. But under the statute of 1893 these questions are easily and must be differently answered. By the express mandate of the statute, they must be decided when the notice of election is framed, and must then be made to appear on the face of the record. If the officials were finally to decide and embody their decision in the recitals, there was no necessity for reciting the facts in the notice of election; and even in the first instance, all they could decide was whether to take the decision of the electors on the question of refunding certain specified bonds and issuing other specified bonds. Then, as soon as the electors decided the question submitted, the record was made up and the decisions a finality. There is absolutely nothing in the statute from which can be implied any power to alter, vary, or depart from this decision. The whole express power given by the statute had been exercised and exhausted. Nothing remained

but the *implied* power to issue the exact and very bonds described in detail in the recorded decision and action of another and different tribunal—the electors—passing on a definite issue and question made up and presented to them. Unless this be so, it would follow that the statute gave implied power to vary at will the details, amount, etc., of the *new* bonds, and to ruin the city by issuing them for any amount they saw fit. For this, we presume, no one would contend, and it is to us inconceivable that upon any construction of this statute there can be found a legislative intent to commit to the city officials the power of deciding contrary to the facts plainly apparent on the face of the recorded notice of election what particular bonds were to be refunded, and by the self-same language in the self-same statute to deny them the power to decide in like contrariety what particular bonds could be issued for the very and only purpose of refunding the particular outstanding bonds specified.

We beg leave to repeat and emphasize the controlling facts and consideration peculiar to this case and distinguishing it from all those decided by the Supreme Court which are cited against respondent on this proposition, that by the statute (1893 Cal., p. 59) the whole of the first section down to the words "said bonds shall be sold by such city council, etc." deals with the making of the record which is to evidence the decision and determination of the electors. From the rest of the section must be *implied* all the power conferred with reference

to the issuing of bonds. And that *implication* is limited and restricted and confined to the sale and issuance of the very identical bonds required by the preceding provisions to be described in minutest detail in the record already made up. The statute is express on this point. It says "said bonds" shall be sold, etc., and it must be construed as if it had said "the bonds so described in said "notice may be issued, sold, etc." We cannot imagine that any legislator or proposer or framer of an act intended to confer the power to make an unlimited issue of bonds, and to decide *de novo* and finally, without reference to any previous action, determination, or record, whether the facts giving the authority to make such unlimited issue existed, could have blundered into phrasing or wording the statute as this is expressed. The legislature is presumed to have known the existing state of the law, especially the previous decisions in California. If such dangerous and unfettered power had been contemplated, if it was the design to reverse the whole policy of the State and change the whole spirit of her jurisprudence, would the very language already construed not to confer this power have been adopted? Would such pains have been taken to cast aside and omit the express grant of power to issue bonds contained in the very statute they were amending? Would any proposal to amend this statute of 1893, when on its passage, by *expressing* the grant of power here sought to be fastened upon it by implication and construction have been even listened to or entertained for a moment?

Imagine a legislature gravely providing for a decision by the voters of a question of issuing certain bonds to be specifically described and spread upon the public records, then, after giving authority to certain officials to sell those specific bonds and no others, inserting in the same section of the same act a proviso as follows:

"Providing the city officials shall have exclusive and "final jurisdiction and authority to determine and de- "cide what the public record already exacted and pro- "vided for does recite and contain, and any recital in "the bonds sold by them shall be conclusive evidence of "the contents of said record and shall estop the city "from showing that the bonds issued and sold are not "those described in said record, no matter how great "may be the excess of the issue."

In the statute in the Sutliff case there was a requirement of a like record to ours, exhibiting in detail the debts, etc., of the county. The Supreme Court, in language which has never been recalled, said it was clear the purchaser was charged with the duty of examining the record, and that there could be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded by the officers issuing the bonds, and cite Dixon *vs.* Field to the effect that the requirement of such a record is necessarily followed by the consequence that such purchasers are bound by the record, notwithstanding any recitals in the bond.

It thus appears that the statute of 1893 was drawn so as to meet the views of the Supreme Court, and so as in the plainest way to exclude the implication of any power to vary the record by recitals or otherwise. The statute on its face and by its controlling and most important provisions expressly refers intending purchasers to a record *explicitly* required to contain the authentic and only evidence of the facts made a condition of the lawfulness of the whole proceeding. If this record fails to show the jurisdiction and lawful exercise of the authority attempted to be exercised, *a fortiori*, if it affirmatively shows the contrary, the purchaser is held to knowledge, and there can be no estoppel. The case stands just like those where the statute requires the facts to appear on the face of the bond, as in Barnett *vs.* Dennison, 145 U. S., 135. Here, as there, we can say, the city was merely agent, possessing only such powers as were expressly given or *implied because essential to carry into effect those expressly granted*, and that the provisions of the statute must be strictly pursued, and the purchaser is chargeable with notice of the requirements of the statute.

Now, here the only *express* power was to frame and make of record a notice showing the facts on its face, and then, if the electors so decided, there was at most an *implied* authority to sell the very bonds specified. This, we may concede, for the sake of argument only, could be implied, because essential to carry into effect the express grant of power. But by what process of reasoning can

it be said that the further power to vary the record by recital must be implied as *essential* to carrying out the express grant? The very making of any operative recitals must affirm on the face of the bonds that the record required by the statute was made, and would thus as fully and effectually as a compliance with the statute in Burnett *vs.* Dennison inform the purchaser of all the facts necessary to enable him to know for himself whether the bonds were issued in accordance with law. What possible difference can it make in principle whether this statute required the face of the bond to specify the bonds to be refunded and those to be issued, or required the notice of election to make the same facts a matter of record? In the latter case, to protect the purchaser, there must be a recital on the face of the bond that the notice of record did state the facts, and, therefore, by intendment of law, the very face of the bond must, in the language of the Supreme Court, inform the purchaser that "there could be no implication that it " was intended to leave that matter to be determined and " concluded, contrary to the facts so recorded, by the offi- " cers charged with the duty of issuing the bonds."

Sutliff *vs.* Board, *supra.*

Here the requisite facts were not of a nature requiring examination and decision. They were like the assessed valuation of property, the consent or non-consent of the county in the Toledo case, the record of indebtedness in the Sutliff case, matters already determined and of rec-

ord, extrinsic facts, themselves conferring the implied power to issue the bonds. The statute does not confer express power to issue bonds generally and then affix conditions precedent, resting *in pais* and requiring examination and decision, but leaves the whole question and grant of power to an implication arising upon an extrinsic record, express power to make which is conferred. The purchaser cannot find in this statute any express power to issue bonds and infer that the conditions to its exercise have been fulfilled. He simply finds and *is told* by the statute in so many words that certain bonds described in a certain record, accesssible to all, shall be sold, *provided* that record recites an outstanding bond or bonds of the city as that to be redeemed or refunded by the sale. He is not led to believe that anything is left to the decision of the officials, but put on his guard and made to know that by the very proposition to sell they affirm that their only power and authority is already fixed and determined by a public record setting forth all the facts.

One distinction here to be noticed is somewhat analogous to that between a court or tribunal invested with *general* jurisdiction over a certain subject-matter, whose decisions within the scope of their jurisdiction import verity and cannot be collaterally attacked, and a jurisdiction which is special and can only arise or be exercised within certain defined limitations or upon the existence of certain extrinsic facts. In the latter case the

tribunal can never give itself jurisdiction by simply claiming it or erroneously deciding that it has it.

This is well illustrated by the cases where a probate court seeks to administer upon the estate of one living. The statute gives jurisdiction over the estates of decedents. It has been often argued and nearly as often overruled that such a statute by implication gives power to decide finally the question of life or death.

If this is the rule, even in cases of superior courts of general jurisdiction and where the record shows the jurisdiction on its face, how can there be any question in case of a special tribunal with limited jurisdiction whose decision, on its face, shows the lack or abuse of power? If any such special tribunal was created by this statute of 1893 it consisted not of the outgoing officials, but of the old council *and* the electors, and their determination, as made patent and of record by the notice of election, is conclusive against the validity of the whole proceeding. The very postulate that a record or judgment or other determination imports verity renders it *felo de se* if, on its face, it shows want of jurisdiction or power. For example, if a superior court of general jurisdiction, in granting probate, should recite the fact that the alleged decedent was still living.

So here the contention is that a special tribunal has been created and given power and jurisdiction to decide finally certain facts. That might be argued if the statute gave a *general* and express power to issue bonds and

specified certain limitations, formalities, and conditions *in pais* as regulating the exercise of the power.

But where, as here, the only power and jurisdiction conferred is special and to sell certain specified bonds or to refund certain specified outstanding bonds, it is precisely like the grant of power to administer upon certain specified estates. The case, then, is like the cases of Sutro *vs.* Pettit and Lehman *vs.* San Diego, and no question of the implication of authority to decide upon the fundamental, controlling, and jurisdictional facts, constituting the sole and special grant of power and jurisdiction, can arise, because "the validity of the bonds "issued did not depend upon any fact—any matter *in* "*pais*—to be determined by the supervisors. The power "to issue the bonds and the limitation of that power, "depended wholly upon the language of the act itself, "and not upon any extrinsic contingency; there was "nothing left to the discretion of the officers."

And the copying of the language of the old statute into the statute of 1893, thus carrying with it the construction already placed upon it, had the same effect as if the statute of 1893 had *in terms* enacted into the statute all the language quoted from Sutro *vs.* Pettit, and had thus expressly repudiated the implication of jurisdiction now sought to be fastened upon or injected into the statute by mere interpretation and construction.

"It is undoubtedly a question of local policy with each "State what shall be the extent and character of the

"powers which its various political and municipal or-
"ganizations shall possess; and the settled decisions of
"the highest courts on this subject will be regarded as
"authoritative by the courts of the United States."

Claibourne *vs.* Brooks, 111 U. S., 400.

The contents of this notice of election (setting forth, among other things, the proposed refunding of $89,000, par value, of the mortgage bonds of a private water company, Findings Nos. 5 and 6, Rec., pp. 19-20; Add. Fdg. No. 2, Rec., p. 34) have the same force and effect as the newspaper publication in McClure *vs.* Oxford, and the reasoning of the court applies here (4 Otto, 429). We submit it is shown that this case falls within Dixon *vs.* Field and the class to which it belongs, and not within Chaffee *vs.* Potter and kindred cases, and that, moreover, the special terms and framework of our statute and the settled previous doctrine of the California courts take it out of all the cases cited by petitioner; also, that we have already sufficiently marked out the distinction between this case and Hackett *vs.* Ottawa and other Federal cases cited on the effect of recitals merely referring to ordinances.

In Hackett *vs.* Ottawa, 99 U. S., 86, there was a *general* power and jurisdiction conferred. The power was expressly given to borrow money and to issue bonds therefor. The court said: "No limitation is prescribed as "to the amount which may be borrowed. Nor is any "express restriction imposed as to the objects or pur-

"poses for which bonds may be issued." There was no provision in the statute requiring the ordinance or the notice of election to contain any statement or recital as to the purposes for which the bonds were to be issued or in any other way providing for any record of the facts made in obedience to express requirement of the statute. There was, therefore, nothing in the statute or on the face of the bonds or in the recitals directing purchasers to any record of the facts. They were not required to know that there was a record showing whether the bonds were issued in compliance with the statute. They were expressly assured that there was none showing any failure to comply. The court said the bonds would have been good *if they had made no reference to the ordinance*, etc.; but in our case these bonds would have unquestionably been invalidated without a reference to or recital of the notice of election. At least, there must have been a recital of compliance with the statute, which could have been held *ex vi termini* to import and certify that there was a recorded notice of election setting forth all the essential and jurisdictional facts which we contend show the want of jurisdiction and flagrant departure from the statute in attempting to refund private debts. All the case decided was that the recitals could not be contradicted *as to the purpose for* which the bonds were issued, where there was no requirement that such purpose should appear on the face of the proceedings. If the statute in Hackett *vs.* Ottawa, instead of giving a general power and jurisdiction, had provided that an ordinance

might be passed specifying the *purpose*, etc., and then that the bonds specified in the ordinance might be sold, etc., the case would have been something like this, instead of being, as it is, its very antithesis, and under such a statute it must have been differently decided or overruled by the subsequent line of cases like Dixon *vs.* Field and the Sutliff case.

Risley *vs.* Village of Howell, 64 Fed., 453; 57 Fed., 544, is subject to the same explanation. It follows and is professedly based upon Hackett *vs.* Ottawa, from which it is said not to be distinguishable. In both cases all that is decided is that the mere circumstances that an ordinance sets forth facts showing an unlawful *purpose*, when there was no statutory requirement that it should say anything on the subject, does not, when recited, impose on the purchaser the duty of examining something the statute gave him no warning would afford him any material or reliable information. By the statute and recitals in Risley *vs.* Howell the purchaser *(that court thought)* had a right to conclude that the bond had been properly issued and sold in strict accordance with law, and that with the purpose or act of the municipal officers in the subsequent disposition of the proceeds of the sale he had no concern. In other words, that he was not bound to see to the application of the purchase-money. The pertinent thing in this case of Risley *vs.* Howell is the reference to the Sutliff case, which shows how the case would have been decided had the Michigan statute resembled ours. The reference then would have read:

"The case of Sutliff *vs.* Lake Co., 149 U. S., 230, is a case "of the same character as the one before us. The bonds "in suit were part of an issue in excess and violation "and utter disregard of the power and jurisdiction pre- "scribed by the statutes; and, as the public records, to "which the purchaser had access, disclosed the lack of "power, he is bound by the facts disclosed by them, not- "withstanding the recital in the bonds that they were "issued in conformity with the statute."

Another case cited on this point is Evansvills *vs.* Dennett, 161 U. S., 434. Much that we have said applies to this case. In addition, we may say confidently that it was not intended to overrule or in any way or degree detract from Dixon *vs.* Field, the Sutliff and like cases. If there had been any such thought, those cases would certainly have been at least alluded to, especially as they have been so often, before and since, mentioned and treated as embodying the settled doctrines of the Supreme Court. Evansville *vs.* Dennett is one of a class of cases in which a town, city, or other municipality has power to issue bonds under a certain charter or statute, and also erroneously claims and asserts power to issue them under some other statute. In such cases it is held that the recitals that the bonds are issued under the statute which does not, in fact, give the power, do not invalidate the bonds if there was some other power, charter, or statute under which they might properly have been issued. Thus, in Evansville *vs.* Dennett there was power under the charter to issue the bonds on a peti-

tion of voters or taxpayers presented to the council. There was also a statute allowing the bonds to be issued pursuant to a vote previously had. The statute, in fact, as it turned out, was not operative, as having been repealed or for some other reason. The council, however, passed a resolution declaring that the bonds were issued under the statute and upon a vote, as the ordinance or resolution did not purport to show, and did not show, that any petition had been presented, and in fact none was presented. The question presented to the Supreme Court was whether a recital in the bonds that they were issued pursuant to an ordinance affected purchasers with notice of the terms of the ordinance and imposed upon them the duty of examining the ordinance. It was held that it did not, and that the purchasers had a right to act upon the supposition that the ordinance conformed to the charter, the only valid statute conferring power to issue the bonds, and that therefore the requisite petition had been presented.

Now, evidently this is simply following Hackett *vs.* Ottawa. There was nothing in the statute or in any of the statutes requiring the petition to state the jurisdictional facts and making such statement a matter of record, public or otherwise. Whether the petition was presented and whether it was a proper petition was left a matter *in pais*, and there was no requirement that any ordinance or resolution should in any way refer to it or make it a matter of record. The decision that the recital implied and assured the purchaser that the ordinance

complied with the statute, in the very nature of the case, could only be a decision that the ordinance contained everything that the statute required it to contain. It certainly did not and could not decide that if the statute had expressly required that the ordinance should recite the petition, the recital would imply that it did not recite it. It may be that the recital implied and even proved that the petition had been presented. That would be simply because, as there was no express statutory requirement on the subject, the matter of the presentation of the petition was left *in pais* and to the determination of the officials issuing the bonds. The ordinance could fully conform to the statute and to every requirement of law and still be utterly silent as to the presentation of the petition. It was the Hackett case over again—simply that the gratuitous and unnecessary statement of a fact in an ordinance did not make the recital of that ordinance notice to the purchaser of the fact. The case must stand just as it would have stood if the ordinance had in all respects complied with the statute, and had not, without any requirement of the statute compelling it, stated any matters showing non-compliance with the law. In the case we are discussing, for instance, the ordinance stated erroneously and mistakenly that the proceedings were held under an invalid statute, and did not state a compliance with the charter; but there was no statutory requirement that the ordinance should say anything about either. The case is the same as if a council having perfect authority to issue

bonds under a valid statute should foolishly and mistakenly and unnecessarily pass an ordinance reciting the provisions of an invalid statute, and that they were proceeding under that, and then issue the bonds, with proper recitals that they were issued in conformity to the law and also in pursuance of ordinances, the general recital would control, according to Evansville *vs* Dennett.

The language of the court in Evansville *vs.* Dennett, 161 U. S., 443, 444, clearly shows that we have correctly interpreted that case, and plainly distinguishes it from ours and such cases as Dixon *vs.* Field and the Sutliff case, which are not mentioned or referred to, as they certainly would have been had the statute of Indiana been anything like ours. This, we submit, is self-evident unless some reasonable and sensible distinction can be drawn between a statutory requirement of a public record accessible to *all* and contained in legible, well-bound books kept by the city itself and any other public record like that of assessed valuation, registry of voters, etc., passed upon in the cases relied upon by petitioner, and even such a distinction would not reach the record in the Sutliff case; but there is no such distinction. *All the reasons* given apply equally to any "express and definite "record of a public character." As appears from the language above referred to (161 U. S., 443, 444), there were two statutes—one invalid, providing for an election; the other, the charter, valid, but requiring a condition *in pais*, nowhere required to be recited or embodied

in any record of any kind or nature, to wit, a petition of two-thirds of the resident freeholders. The court thought that the question whether there was a petition, whether it was signed by the requisite freeholders, etc., like other conditions *in pais*, was *intended by the legislature* to be left to the determination of the officials; that it was not necessary or required by the statute that such determination should appear of record or by ordinance or otherwise than by a recital in the bonds; that a mere recital of compliance with the charter concluded the question, and that, though there was an unnecessary and superfluous recital of an ordinance, the purchaser had a right to assume, even if he had seen the ordinance, that the election under the invalid statutes was a harmless surplusage, and that, as recited, both methods were pursued, and both the valid and invalid statutes complied with. The ordinance did *not* show, as does the notice of election in the case at bar, *affirmatively* a want of jurisdiction or abuse of power. It merely *failed* to show or make matter of record a fact which no statute required the ordinance even to allude to, and which the statute did no contemplate the entering of upon any record. According to the views of the court, the bonds would have been equally good if the ordinance had been equally silent as to the petition and the election, and the recital had simply been a compliance with the charter, omitting all reference to the invalid statute and the ordinance. This was merely following the Hackett case. The holding that the recital imported that the ordinance

was in conformity with the statute is entirely consistent with the doctrine of Dixon *vs.* Field, the Sutliff case, and like cases. In those cases an express recital that the records in question existed and fully conformed to the statute requiring and providing for them would not have varied or influenced the result except by furnishing an additional ground for the same decision. If the express recital in the case at bar of the notice of election imports its conformity with the statute prescribing its contents, it thereby imports that the record thereof absolutely furnished the exhaustive and conclusive proof of the power of the officials in regard to issuing the bonds and the sole test of the regularity of its exercise. It does not present a case like Evansville *vs.* Dennett, where, notwithstanding the ordinance recited fails to show the power and jurisdiction affirmatively, there was still another source of power not alluded to in the ordinance under which the proceedings might have been regular, and which did not require the facts calling it into existence and justifying the action taken to be specially or otherwise recited and spread on the records. What would have been the answers to the questions in Evansville *vs.* Dennett, even under the Indiana statute and the Indiana decisions and jurisprudence relied on and followed, if the ordinance had shown affirmatively a lack of power and jurisdiction under both the statute and the charter, we need not consider further. We think nothing special need be said concerning the other decisions relied upon by petitioner, because we submit what we

have already advanced applies to and covers them all. In so far as they agree and follow the decisions of the Supreme Court, it certainly does; and if there be any inconsistent therewith, which we think there are not, they are not authority here.

National Bank *vs.* Board, 62 Fed., 789, is fully in line with our contention and well illustrates the difference between this case and all those cited against that contention.

The law always has some reference to common sense and the actual transaction of affairs. No man in his senses would or could in good faith invest in bonds under a statute such as ours without first investigating the notice of election, ordinance, etc. No lawyer would attempt to pass the bonds without calling for these documents. He would, after the first glance at the statute, see that the only power was to sell the particular bonds detailed in the record authorized by law; and, in fact, we find the very first thing called for and examined here was this very record (Additional Finding 3, Rec., pp. 39-41; Testimony of C. D. Turney, Rec., pp. 244, 245; Testimony of F. H. Prince, Rec., pp. 246-247).

In the petition for a rehearing and for a *certiorari*, some cases not already specifically reviewed by us are relied upon as in point and conclusive of the question passed upon in the prevailing opinions in the circuit court of appeals. Counsel "call the special attention of "the court to the case of Graves *vs.* Saline County, 161 "U. S., 359," and say they consider it controlling and

decisive, etc. We respectfully submit that the case is not at all in point.

The report of the case shows that the court had in view no such question as that here presented and decided, and the opinion does not even allude to such cases as Chaffee *vs.* Potter, Sutliff *vs.* Board, and Dixon *vs.* Field. The case was decided and went off on wholly different considerations and propositions. On principles which were carefully and elaborately discussed, and which, on the theory advanced by the plaintiff in this case, there would have been no necessity or propriety of considering at all.

If the recitals in the Graves case had been deemed conclusive without regard to the invalidity of the bonds refunded or the nature of the invalidity, the whole *ratio decidendi* of the opinion would have been purely obiter and uncalled for. If the case had been similar to ours —if, for example, the bonds refunded had been forgeries or had been the bonds of some other county than the county of Saline, or of some private individual or corporation—then not one reason advanced in the opinion of the court would in the slightest degree have tended to justify the conclusion reached.

What was decided was that of the bonds refunded, the St. Louis and Southeastern bonds were valid *ab initio* and without any aid from the recitals in the new bonds. As to the Bellville bonds, it was held that though originally invalid, the invalidity depended upon and grew out of a failure to comply with certain conditions, those conditions were not necessarily imposed; and as the

county had the power to issue the bonds unconditionally, it could afterwards waive a compliance with them. And the fair inference from the opinion is that if the statute authorizing the issue of the Bellville bonds had required the imposition of the conditions, then compliance with the conditions could not have been so waived and the decision would have been different.

This Court said: "It may be admitted that * * "where the right to exercise the power has been sub- "jected to conditions prescribed by the legislature, the "municipality cannot dispense with or waive such con- "ditions." So, in our case, the recitals in the refunding bonds cannot be treated as ratification of validation of the bonds refunded or as an estoppel to deny their validity, because, as said in the opinion quoted from, the city could not ratify a contract into which it had no power to enter, or dispense with the condition imposed by the statute expressly confining its power to the refunding of indebtedness evidenced by its own bonds.

As to the statutes of Illinois requiring the description of the bonds to be entered, it does not appear by the report to have been complied with; and if it had, this Court expressly declined to decide any such questions by the statement that no formal answer to the question certified, viz: whether the county was estopped by the recitals in the funding bonds to assert that the bonds refunded were not binding obligations. It is claimed in the petition for a rehearing that the Gunnison case, 173 U. S., 255, is *exactly in point and controlling.* That case

was not relied on in the circuit court or in the circuit court of appeals, we suppose, because neither the court or the then counsel supposed it varied the law as previously laid down. And we submit they were justified in so considering it. This Court evidently did not consider that it was in that case enunciationg any new doctrine; and we submit that all it did in deciding that case was to hold that while fully adhearing to Dixon *vs.* Field and the Sutliff case, as well as to Chaffee *vs.* Potter, the Gunnison case was ruled by the former instead of the latter. Very likely, in the plentitude of their zeal and ability, the respective counsel in the Gunnison case advanced many arguments and took many positions *pro* and *con*, which, if necessarily involved and actually *decided*, might have a bearing on the question here involved. But the decision and necessary ratio of the Gunnison case adds nothing whatever to the argument which might as well have been made in this case had the Gunnison case never arisen. The contention in the Gunnison case was that the bonds were invalid in the hands of *bona fide* holders because the indebtedness to fund which they had been issued was in excess of a *constitutional* limitation. Counsel say in their petition that it was argued in the Gunnison case that an examination of the records would have shown a certificate of the county commissioners stating the amount of indebtedness of the county and showing that it was beyond the constitutional limit presented by the constitution and statutes of the State. We do not gather from the re-

port of the case that there was or could have been any valid contention that the certificate would have shown any violation of the *statute*. It is true that the statute provided that the amount of bonds issued should not exceed the amount of the county indebtedness at the date of the first publication of the notice, *and that the amount should be determined by the commissioners, and a certificate made of the same and put on record.* But, as shown in the opinion of the circuit court of appeals, even if a purchaser were held to knowledge of this certificate, there was nothing in it to inform him that the *statute* had been violated. If the record in the Gunnison case had shown that the issue exceeded the sum of the county indebtedness at the date of the first publication as shown by the certificate, and that each bond disclosed the amount of the whole issue, the decision made would not have been made without an explicit statement to that effect. Such a decision would have directly and palpably overruled the Sutliff case, which was by the strongest implication recognized in the opinion rendered. The pith and point of the decision of this Court in the Gunnison case is found in the declaration that the Court declines to overrule Chaffee *vs.* Potter, and while equally affirming the Sutliff case and Dixon *vs.* Field, holds that the Gunnison case is ruled by the former.

In Chaffee *vs.* Potter, as in the Gunnison case, the point decided was as to the *constitutional* and not the statutory limitation. Certainly, if in the case of Chaffee *vs.* Potter the point had been made and sustained by the record

there, the certificate of indebtedness made and spread on the records in obedience to the provisions of the statute under which the bonds were issued, showed that the issue was in direct contravention of the statute declaring such excessive issue null and void (142 U. S., p. 360), the decision must, on the very principles laid down in the opinion of Justice Lamar, have been the other way. In other words, it was not decided or intimated that the purchaser must not look to the records, but simply that, even if he did look to them, they would not in that case have notified him of the invalidity of the issue. If each bond in Chaffee *vs.* Potter had, as in Lake *vs.* Graham, disclosed the amount of the whole issue, the purchaser would have been defeated if an examination of the assessment roll, with the bond, would have disclosed the invalidity. And by a perfect parity of reasoning, if the certificate of record be substituted for the assessment roll, the result must be the same. If any distinction, however refined, can be here drawn, it must be based on the fact that the Colorado statute *in express terms* submitted the determination of the amount of indebtedness to the commissioners. But the same statute in the same terms required that determination to be spread on the records; and, what is more to the purpose here, the California statute confers no such express power of determination upon the city officials.

The opinion of the circuit court of appeals in the Gunnison case clearly shows that, so far as the question now in view is concerned, that case could well have been

decided, as it was decided, without in the slightest degree conflicting with the position taken by the circuit court of appeals in our case.

And, except with reference to the question of *bona fide* purchase, the opinion of the circuit court of appeals in the Gunnison case stands well and in perfect harmony and consistency with the opinion in this Court in that case.

When this Court said that the rulings of the circuit court on evidence and in its charge were inconsistent with the principles of its opinion, it but reiterated what the circuit court of appeals had said in its opinion, and an all sufficient reason for reversing the judgment of the circuit court of appeals is found in the difference of view concerning the five bonds taken in exchange for warrants.

We beg leave to repeat that in order to make the Gunnison case authority for this case, we must assume that something is there decided which would be applicable if, in that case, each bond had shown on its face the total issue and the certificate of indebtedness compared with any one bond would have demonstrated the invalidity of the issue—a proposition which, we submit, was not within the contemplation of the Court and is not sustained by anything in the reasoning of the opinion. It is quoted in the petition from that opinion that the principles announced by no means render it impossible to guard against excessive municipal indebtedness, because the State "may prescribe a definite rule or test for

determining whether the limit has been exceeded." Now, if a statute like that of Colorado involved in the Gunnison case takes pains to say that the issue shall not exceed the amount of the county indebtedness at a given time, and that a certificate of such amount shall be made and put on record, and that any issue in excess of the sum so appearing of record shall be null and void, would any one say that the suggestion of this Court had not been adopted? If that is not prescribing a definite rule or test for determining whether the limit has been exceeded, what would constitute such a rule or test? Hence, too, we submit, this Court did not, in this respect, overrule the circuit court of appeals in the Gunnison case, or intend to say that if taking each bond and comparing it with such a certificate, the recital is contradicted, the recital must prevail. Why should it? The statute tells the intending purchaser that the test has been provided and is to be found of record. What matters it whether that record or that test is a certificate or an assessment or any other public authentic memorial accessible, and easily accessible, to all? It is not necessary that the State, in protecting her citizens, shall go so far as to destroy all the negotiable qualities of the bonds. She should be allowed to protect both the citizen and the purchaser—the latter by cutting off all defenses *in pais*, but still requiring him to examine the specific records provided for in the very statutes and laws which confer the authority to issue the bonds and at the same time prescribe not only the limitations of that

authority but also the definite test by which their observance may be determined. In Geer *vs.* School District, 97 Fed., 732, it is held that bonds reciting compliance with all the requirements of a statute limiting the issue to a certain percentage of the assessed value of the property of the municipality were invalid in the hands of a *bona fide* holder where the limit was exceeded; that is, where the record or test prescribed contradicted the recital. It was held that the case was ruled by Dixon *vs.* Field, Lake *vs.* Graham, and Sutliff *vs.* Commissioners, rather than by Chaffee *vs.* Potter or the Gunnison case. There, as here, if that be the test, the statute did not expressly commit the determination to the officials issuing the bonds. The recitals there were equivalent to those here; for a recital that the statute has been complied with cannot be made any better or more efficacious by any repetition or detail. And, in fact, the specification in the recital in our case so much relied on is not apt for the purpose intended. The notice of election had specified the bonds of a private corporation and declared them to be part of the bonded indebtedness of the city *because* they were a lien on city property. This *non-sequitur* is carried into the recital, which does not follow the statute and say "indebtedness evidenced by bonds of the city," but simply "bonded indebtedness of the city."

It is not a recital of facts constituting compliance with the statute, but, at best, a conclusion or opinion.

So, in another recent case, since the Gunnison case, it

is held that the doctrine of Dixon *vs.* Field and the Sutliff case is unaffected by that of Chaffee *vs.* Potter, and consequently by the Gunnison case, and that notwithstanding the recitals the municipality is not concluded as to any facts expressly required by statute to be made a matter of public record open to the inspection of every one.

National Life, etc., Co. *vs.* Mead, 82 N. W., 80; (S. C.) 83 N. W., 335.

According to that ruling there is nothing in the Gunnison case conflicting with the opinion of Judges Ross and Hawley, because the fact of the character of the bonds refunded was one as to which the city could not be concluded by any recitals, for the same reasons that it could not in the case cited be estopped as to the amount of the existing indebtedness.

Purchasers were bound to know by what authority the mayor and city clerk executed the bonds, and who was mayor. As the statute gave no such authority, they were bound to examine ordinances and records showing authority and official character of officers, and therefore had notice of invalidity of the bonds as shown by such ordinances and records.

But there is another insuperable objection to any recovery on these bonds, in dealing with which we are driven to no weighing or analysis of authorities, and

which can be overcome, we submit, only by a disregard of the most elementary principles, as to which there is no semblance of conflict.

Recitals or no recitals, and without regard to their character, the purchaser is by law, and without regard to the fact of ignorance or knowledge, *held* to know the official character of the signers and issuers of the bond. Before the recitals can have any force the authority to make them must be shown otherwise than by the recitals themselves. (See Bissell *vs.* Township of Spring Valley, 110 U. S., 162.)

We also beg leave to call particular attention to the late and well considered case of Browser *vs.* Bon Homme, 46 N. W., 173, cited by Simonton, sec. 45, p. 53, where the statute, like ours, did not itself confer any authority to sign, etc., upon the particular officials (e. g., the mayor or clerk), and where, as in our case, it therefore was necessary for the purchaser to satisfy himself by the records. In all such cases of *special* power to sell or issue certain bonds, this duty becomes more imperative. But it exists in *all* cases where the statute calls the attention of the purchaser to a record. As, if the record referred to be the vote cast at a preceding general election, all purchasers are bound to take notice of what that record discloses. For the facts disclosed by such a record, whether they consist of the number of votes or the particularly recited bonds to be refunded or issued, "are "not dependent upon any calculation or investigation

"or weighing of facts by officers charged with the duty "of issuing bonds."

Citizens *vs.* Perry, 156 U. S., 692.

And see the cases cited in Browser *vs.* Bon Homme, from which it is made clear—if authority could be needed—that as to the official character of those signing and selling these bonds and their *power* to do what they did, no recitals could excuse or relieve the purchaser. He must act at his peril, and is held to know the facts. Purchasers of such bonds "must *take the risk* of the offi- "cial character of those who execute them."

The finding is that some of these bonds were signed by Jeter, after the election and qualification of his successor. The finding, therefore, is that when he signed them he was not the *de jure* mayor of the city. Of this the law imputes notice. Of this the purchaser takes all the risk. He is held to have examined the records to this extent, whether he did or did not. For only by examination of the statutes and the records of the council could these facts be ascertained. The statute told him that these bonds could only be sold by the council, and when he saw one of them purporting to be signed by the mayor, it was incumbent on him to examine and inquire whether the council had acted. This took him at once to the recorded ordinance requiring the signature of a *de jure* mayor, and that necessarily took him to the records showing the election and qualification of Effey. It matters not whether by the records he could ascertain the

fact here found, viz: that Jeter signed these bonds after he had ceased to be mayor. He was bound to ascertain the fact at his peril. He certainly could have ascertained the truth with very little trouble, and by the records he would have found that Effey qualified on the very day the bonds purported to be signed, and he is presumed to have known the law placing upon him the peril, if, in fact, Effey qualified before Jeter signed. At any rate, the purchaser is bound by the result and the fact. And the fact is that before these bonds were signed Jeter had ceased to be mayor, and Effey, from the moment he qualified, was mayor, and in office, and Jeter, until he acquired some new and subsequent right or title, was a mere intruder and usurper, and had no more right to sign these bonds than had Coffin or Stanton.

State *vs.* Callaghan, 61 N. W., 1025.
Supervisors *vs.* O'Malley, 46 Wis., 64.
People *vs.* Callaghan, 83 Ill., 135.

Where it is said: "The taking of the oath * * * "was an acceptance and *user* of the office. It does not "militate against this view that defendant (e. g., Effey) "had discharged no actual duties of the office. He had "taken the oath of office that obligated him to perform "its duties when called upon to do so."

People *vs.* Board, 56 N. Y. Supp., 318.
Olson *vs.* Board, 54 P. (Kan.), 805.
State *vs.* Ivings, 36 A. (N. J.), 685.

Williams *vs.* Boynton, 47 N. Y., 426.
School District vs. Dorton, 46 S. W. (Mo.), 950.
Hand *vs.* Deady, 29 N. Y. Supp., 633.

Woods *vs.* Inhabitants of Bristol, 24 Atl., 856, a late case from Maine, in connection with which we cite as to the effect of the assignment,

McLean *vs.* Valley Co., 74 Fed., 395.

In the light of these authorities, and many others which might be cited, it is clear on the findings and the whole record in this case that purchasers were affected with knowledge that the bonds (or an indistinguishable part of them, which is all the same) were signed by an intruder and usuper, and that *when they were signed* they were mere nullities. As much so as if the signatures had been proved to be *forgeries*, or the bonds stolen before they were ever delivered. In such case, it is clear they could not be enforced; for while the Supreme Court has decided that bonds *delivered in escrow*, and put in circulation in violation of the escrow, may, *under circumstances*, be valid, the whole reasoning of the opinion and the cases relied upon and cited with approval by it demonstrates that such would not be so in the case of a forged or stolen bond.

Provident *vs.* Mercer, 170 U. S., 604-5,

which cites and approves Burson *vs.* Huntington, 21

Mich., 431, in which the true rule is expressed: When the paper has never been delivered, and therefore had no legal inception or existence, it is in law but a blank piece of paper, and the theft cannot create a valid contract on the part of the maker against his will, where none existed before.

To the same effect are the other cases, and see also City of Johnson *vs.* Charleston, 44 S. W., 674, where it is said: "This recital estopped the city, in a litigation "with innocent holders of the bonds, from denying any "recital or implied fact which the enactment made it the "duty of the city board to ascertain, determine and "certify, originally and independently of any public rec- "ord to which such holders might have had access. It "did not estop the city in such a case, however, from dis- "puting the existence of any fact which its board was "not by the enactment required to decide in the first in- "stance, or which was to be determined by some other "authority or from some record accessible to the public."

Here the record, made by the notice of the election, was the record made by the concurrent action of the council and the electors. It had to be complete before the power to sell and issue the bonds *could* come into play, and it was thus the action and determination of a different and other authority, and was expressly made the basis of the subsequent action of, it might be a different, subsequent, and newly elected council.

Then, as the purchaser knew the bonds were nullities when signed and so far as the *de jure* character of the

officials was concerned, in what way can he rely upon them? Manifestly in one way only. That is by showing that, though not *de jure*, they were *de facto* officers. The *findings of fact* do not show this. All that is found is that they continued to act publicly, without protest, and held seventeen meetings. But all this is merely evidential and does not find the ultimate fact or facts from which it necessarily follows that they were *de facto* officers. It is not found what they did, except to hold meetings, to which latter we will advert later on. From all that is found, the only thing they did might have been to perform the very act in question; and to hold that this furnished any evidence of their authority to act, would be begging the whole question.

State *ex rel* Corey *vs.* Curtis, 9 Nev., 341.

Nor does it appear—and, as we have seen, the contrary does appear or is implied—that all the parties interested did not have knowledge that they were not officers *de jure*.

Ibid., p. 339.

City of Louisville *vs.* Higdon, 2 Met. (Ky.), 528.

The statute (Stats. Cal., 1875-6, sec. 7, p. 192) shows that no regular meeting of the common council was held between the 15th of April and the 7th of May, 1894, and the findings do not show that the newly elected mayor or council or any citizen had any notice or knowledge of

any of the so-called special meetings over which Jeter is found to have presided within those dates.

The findings must be sufficient *per se*, and the findings of *fact*, like a special verdict, must set forth everything necessary to justify the judgment—nothing must be left to inference, etc.

Garland *vs.* Davis, 4 How., 131.
Evans *vs.* Kister, 92 Fed., 832-3.

If we go back of the findings to the evidence, the case is still worse for the petitioner. In fact, the whole transaction was carried through in haste and under circumstances to excite suspicion rather than to lull any honest inquirer and mislead him; such an inquirer, knowing that the officials were not *de jure*, that their successors had been elected and had actually qualified, could have no excuse for purchasing these bonds. His very first step would be to ascertain whether they were really *de facto*, and up to the *time of signing* these bonds, he must have found they were nothing of the kind. In answer to this, the only argument is that they *afterwards* became *de facto officers*, and as such, ratified the act of signing the bonds and made it their own. But here is encountered another absolutely insuperable difficulty. The only evidence of ratification is found in the records of the action of the council, and they disclose on their face, beginning with the meeting of April 16th, only the doing of acts in utter violation and disregard of the statute of 1893. Certainly purchasers cannot rely

upon *such* acts, as making good that which was void in its inception. They can't say, we had a right to rely on these acts in violation of the statute as constituting the usurpers *de facto* officers, and in the same breath plead ignorance of those very acts as imparting notice that the bonds were unlawfully issued. Such a perversion of the equitable basis of the *de facto* doctrine is as novel as it is indefensible.

The *general rule* of law is that all persons dealing or contracting with municipal corporations do so at their peril, and are held to the duty of inquiring both as to the power of the city and the power and authority and official character of the agents, and of seeing to it themselves, and for themselves, that the mode of acting has been strictly followed.

Thus we find the *rule* laid down in the books, as in Dillon, for example, who says that in these cases the only safe rule of construction is the rule of strict construction. Nowhere has this rule been more fully adopted or more woven into the warp of jurisprudence and policy than in California.

In dealing with the *exception* to the rule, Dillon says, section 549, that on principle a legislative intent to invest local officers by means of a false recital with powers so tremendous ought not to be held to exist, unless it is plainly declared or implied.

But we are now dealing with a difficulty and infirmity in the case of ~~defendant in error,~~ petitioner, which is to be solved wholly by the *general* rule, and which the *exception* can-

not apply to or aid. As to this point, the case stands just as all those cases where there were no recitals stood in respect to all infirmities and defects in the proceedings. If there had been no recitals in these bonds, we suppose it is conceded, at any rate it is self-evident, that there could be no recovery. The purchaser would be held bound by the records, including the ordinances and all the proceedings. He would be bound by the real facts, however shown, and not by the distorted semblance presented in carefully cooked-up and *premeditated* (Rec., pp. 54, 55, 56) recitals. Equally *as to the official character, authority, etc.*, he is so held and bound, for, as to that, the recitals are as if they were non-existent. He is held to have known, and he must have found out in the very act of ascertaining the authority, official character, etc., of the officials, that (Rec., p. 54) in February these officials were still in office, and expecting either to be re-elected or to have time to complete the job before the 16th of April, fixed up a lot of *peculiar* recitals, by which, on the 16th of April, when the bonds were to be signed, many things were to be recited which had not yet occurred—a lot of prophetic recitals; also, that on the 16th the new officials had qualified; also, that on the same 16th, and after such qualification, the outgoing or outgone mayor signed them so as to hurry the job through. When the purchaser came to look further to find any ratification of this strange and usurping act, the first thing he would find (Rec., p. 161) was that the notice of election "fully set forth and described the

indebtedness proposed to be funded," and, by comparing the ordinance (320) with the previous ones, that the whole scheme was in part to take up and pay off a private indebtedness of nearly $100,000; and then, by the proceedings of April 16th and all the subsequent proceedings of the usurpers, he would find that each and every act which could possibly be construed into a ratification, or as constituting the actors *de facto* officers, stamped the whole transaction thus hurried through as an unmitigated fraud and perversion of the powers of the office. Can it be seriously contended that the giving away or allowing to be stolen of these bonds ratified and made good *ab initio* the wrongful and unauthorized signing of them in the first instance? Can it be held that a *de facto* holding by a usurper can be made out by one day's acts, consisting entirely of the very transaction the validity of which is in question? The very idea of *de facto* holding presupposes a reliance upon the facts constituting the holding and a wrong by being misled into acting upon their faith. It is impossible, then, that the party so relying can plead ignorance of the very thing relied on. The sum of it is, that the *recitals* cannot help the purchaser on this point, and the *facts* are fatal to his recovery.

RECITALS IN BONDS WERE MADE WITHOUT LEGAL AUTHORITY.

Neither the enabling act, nor any other statute of California, gave any power, either expressly or by implica-

tion, to the city officers to make any recitals whatever in the bonds in question; but, on the contrary, the terms of the enabling act, by express limitation, forbid the making of any such recitals, in this, that the enabling act requires the very terms of the bonds to be issued, including every detail thereof, to be prescribed and finally fixed and passed upon by the people, before the occurrence of any of the acts recited in the bonds. The language of the enabling act is as follows:

"Whenever any incorporated city or town, other than "cities of the first class, in this State, has an outstand- "ing indebtedness, evidenced by bonds and warrants "thereof, the common council, board of trustees, or other "governing body thereof, shall have power to submit to "the qualified electors of such city or town, at an elec- "tion to be held for that purpose, the question of refund- "ing such indebtedness. SAID ELECTION SHALL BE "CALLED AND HELD IN THE SAME MANNER IN WHICH "OTHER ELECTIONS ARE HELD IN SUCH CITY OR TOWN. THE "NOTICE OF SUCH ELECTION SHALL RECITE THE INDEBTED- "NESS TO BE REFUNDED, TOGETHER WITH THE DENOMINA- "TION, CHARACTER, TIME OF PAYMENT, RATE OF INTEREST, "AS WELL AS ALL OTHER DETAILS OF THE BONDS PROPOSED "TO BE ISSUED" (Stats. Cal. 1893, p. 59).

The statute therefore required the form of the refunding bond, in all of its details, to be fixed, beyond the power of the city officers to change it, in any manner, at a time when it would be impossible to make any of the

recitals contained in the bonds in question, thus necessarily and absolutely precluding the idea that such officers might lawfully make any such recitals.

The act of the legislature in thus precluding the officers of the municipality from determining any matters of fact by recitals in the bonds, is in accordance with the uniform policy of the State of California.

Const. Cal., Art. XI, Sec. 18.
McCoy *vs.* Bryant, 53 Cal., 251.
Sutro *vs.* Pettit, 74 Cal., 336.
Sutro *vs.* Rhodes, 92 Cal., 117.

All purchasers of the bonds in question had notice, by the very terms of the enabling act (Stats. 1893, p. 59), of which they were bound to take notice, that the form of the refunding bonds, including every detail thereof, must be fixed before the occurrence of any of the acts alleged to be covered by the recitals, and that the officers of the city had no power, after the election on the question of refunding, to change the details of the bonds to be issued, by reciting acts or events occurring after the passage of the ordinance submitting the question of refunding to the people of the city.

"Full control in the matter" was not given, by the statute, to the officers of the municipality in this case—indeed no control, over the question of refunding, or of estopping the city by recitals, was given to such officers—and therefore the rule contended for by petitioner, and, in support of which the case of Bernards Township

vs. Morrison, 133 U. S., 523, 527, is cited, has no application.

Bonds of the City Water Company were not bonds or warrants of the city of Santa Cruz, and that indebtedness of the City Water Company was not indebtedness of the city of Santa Cruz "evidenced by bonds and warrants "thereof."

Counsel for petitioner, in his brief on application for the writ of certiorari herein, contended that the bonds of the City Water Company (a private corporation), for the refunding of which the bonds here in question were, in part, issued, were "indebtedness of the city of Santa "Cruz evidenced by the bonds thereof," within the meaning of the enabling act.

This proposition, on behalf of petitioner, is novel and is contrary to the unchallenged findings and decision of the trial court, which held that they were not either bonds or warrants of the city and did not constitute any part of the city's "indebtedness evidenced by bonds or "warrants thereof" (Findings of Fact Nos. 3, 5 and 6, Rec., pp. 18, 19, 20; Conclusions of Law, Rec., p. 23).

These conclusions of fact and of law were acquiesced in by petitioner in the trial court, and we submit that it is too late to raise that question, for the first time, in this court, for the purpose of overturning the intermediate decision of the circuit court of appeals.

But they were not, and could not be, indebtedness, evidenced by bonds or warrants of the city of Santa Cruz,

because, as a physical fact, they did not purport to be such, and any attempt on the part of city officials, by ordinance, or otherwise, to make them such would be in direct violation of article XI, section 18, of the constitution of California, which is as follows:

"No county, city, town, township, board of education, "or school district shall incur any indebtedness or lia- "bility, in any manner, or for any purpose, exceeding in "any year the income and revenue provided for it for "such year without the assent of two-thirds of the qual- "ified electors thereof, voting at an election to be held "for that purpose, nor unless, before or at the time of "incurring such indebtedness, provision shall be made "for the collection of an annual tax sufficient to pay "the interest on such indebtedness as it falls due, and "also provision to constitute a sinking fund for the pay- "ment of the principal thereof on or before maturity, "which shall not exceed forty years from the time of "contracting the same. Any indebtedness or liability "incurred contrary to this provision shall be void."

They are not even colorable obligations of the city of Santa Cruz, and if they were, they could not be refunded under the enabling act of 1893, which expressly limits the refunding to *indebtedness "evidenced by bonds or "warrants" of the city.*

It is well settled that, in the absence of statutory authority, a municipality has no power to assume the obligations of others or to issue bonds and that bonds

issued by a municipality without such statutory or constitutional authority are absolutely void.

Wills *vs.* Supervisors, 102 U. S., 625.
Claiborne County *vs.* Brooks, 111 U. S., 400.
Concord *vs.* Robinson, 121 U. S., 165.
Kelly *vs.* Milan, 127 U. S., 139.
Brenham *vs.* German-American Bank, 144 U. S., 173.
McCoy *vs.* Bryant, 53 Cal., 241.
Sutro *vs.* Pettit, 74 Cal., 336.

The authorities cited by counsel for petitioner in support of the rule that a purchaser of land subject to mortgage who agrees to pay the obligation secured by the mortgage becomes personally liable for the obligation are manifestly irrelevant here, because they all relate to the transactions of private individuals and private corporations, and have no reference to the limitations, in this behalf, imposed upon municipal corporations by the constitutional provision above quoted.

Other Questions Involved.

The circuit court of appeals, having reached the conclusion that the judgment of the circuit court, in this case, must be reversed upon the single proposition discussed in its prevailing opinion (Rec., pp. 312-3-4-5), expressly declined to consider any of the numerous other points presented by this respondent in that court, except the question of jurisdiction, saying:

"Entertaining these views, it is not necessary to de-
" cide any other point made and argued by counsel, ex-
" cept that as to the jurisdiction of the court" (Rec., p. 315).

We respectfully submit that if, for any reason, this court should hold the views of the circuit court of appeals, upon the single question on which it reversed the judgment of the trial court, to be erroneous, the respondent herein has a right to have the other points which it presented to the circuit court of appeals, but which were not considered or decided there, heard and determined by this court.

Otherwise the respondent might be substantially deprived of its right of appeal, by having a decision erroneously rendered in its favor, on a single point, by the intermediate appellate court, reversed by this Court and the original judgment thus made final against it, without having the substance of its appeal considered or examined by either of the appellate courts.

Assuming, therefore, that this Court will, if necessary, consider the entire case, as if it had been brought here by appeal or writ of review originally, we proceed to a discussion of the other points upon which respondent, in the circuit court of appeals, sought a reversal of the judgment of the circuit court, but which points, for the reason given in the prevailing opinion of that court, were not there considered or decided.

II.

EVEN IF THE BONDS IN QUESTION WERE NOT VOID WHEREVER FOUND, YET THE CIRCUIT COURT ERRED IN RENDERING JUDGMENT AGAINST DEFENDANT UPON THE NINE BONDS AND 150 COUPONS (AMOUNTING TO $16,500) ASSIGNED BY E. G. & E. WALLACE TO PLAINTIFF, BECAUSE IT APPEARS FROM THE FINDINGS OF FACT THAT SAID E. G. & E. WALLACE HAD KNOWLEDGE AND NOTICE OF THE FACTS SHOWING AND CONSTITUTING THE INVALIDITY OF SAID BONDS AND COUPONS AT THE TIME OF PURCHASING THE SAME *(Findings Nos. 8, 12 and 13, Rec., pp. 21, 24; Additional Findings Nos. 1, 2 and 3, Rec., pp. 26 to 41, inclusive; Complaint, Rec., pp. 4 to 6; Testimony, Rec., pp. 99-101; Assignment of Error No. 30, Rec., p. 277; Error No. 31, Rec., p. 278; Error No. 35, Rec., pp. 286-7; Error No. 50, Rec., pp. 296-7; Error No. 51, Rec., p. 297; Error No. 52, Rec., pp. 297-9; Error No. 55, Rec., p. 300; Error No. 58, Rec., pp. 300-301; Error No. 59, Rec., p. 301).* Specifications supra pp 65-6, 84, 106, 108-9, 115, 117-8.

In addition to the knowledge and notice imputed to all bondholders (assignees of plaintiff herein) by the constitution and statutes by the public records (including ordinances) required by law to be kept (Rec., pp. 19-20, 26-8, 30-31, 32-34, 37-8), and by the examination of circular showing indebtedness and assessed value of taxable property (Rec., pp. 97 and 101), which circular and opinions were exhibited to nearly all purchasers of the

bonds in question, before purchasing (Rec., pp. 91 to 146), as well as to E. G. & E. Wallace (Rec., pp. 24, 39-40-41, 99-101), the said firm of E. G. & E. Wallace had full knowledge through their agents, F. H. Prince & Co. and M. F. Dickinson, of all matters contained in Ordinances Nos. 314, 315 and 320, showing the invalidity of the bonds in question (Finding No. 12, Rec., p. 24). The circuit court expressly found that E. G. & E. Wallace purchased 150 of the bonds and coupons in question from Coffin & Stanton on September 22, 1894, and that said purchase "was made by the firm "of F. H. Prince & Co., acting as agents of E. G. & E. "Wallace"; and further found that "at the time of the "sale of the refuding bonds of the defendant city to "E. G. & E. Wallace, the said F. H. Prince & Co. had no- "tice of all matters recited in the ordinances of defend- "ant numbered 314, 315 and 320" (Finding No. 12, Rec., p. 24), and the circuit court below adjudged (as we have elsewhere in this brief shown) that the said Ordinances Nos. 314, 315 and 320 show upon their face not only their own invalidity, but also the invalidity of each and all of the bonds and coupons in question (Findings Nos. 3, 5, 6, Rec., pp. 18-19; Additional Findings Nos. 1 and 2, Rec., pp. 26-8, 30, 31, 33, 34, 37-8; Conclusions of Law, Rec., p. 25). In addition to this, the circuit court found that by agreement between F. H. Prince & Co. and E. G. & E. Wallace an opinion as to the validity of the bonds in question was procured from Mr. M. F. Dickinson, an attorney-at-law, which opinion was submitted to

E. G. & E. Wallace prior to their purchase of the bonds, and that Dickinson had notice of all matters recited in said Ordinances 314, 315 and 320 (Additional Finding No. 3, Rec., pp. 39-41).

Under the general rule that notice to an accredited and admitted agent is notice to his principal, this showing would defeat the claim of E. G. & E. Wallace that they were innocent purchasers of the bonds; but the circuit court also found that F. H. Prince & Co. were the agents of Coffin & Stanton, as well as of E. G. & E. Wallace, in the transaction, and were to receive compensation from both parties thereto; that F. H. Prince & Co. did not communicate their knowledge of the ordinances to E. G. & E. Wallace; that E. G. & E. Wallace had no actual knowledge or notice of any fact tending to impeach the truth of the recitals contained in said bonds (Finding No. 12, Rec., pp. 45-6), and further found that Dickinson was the attorney of F. H. Prince & Co. and not the attorney of E. G. & E. Wallace, and did not communicate his knowledge of said ordinances to E. G & E. Wallace (Additional Finding No. 3, Rec., pp. 39-41).

The circuit court, in its opinion, after reviewing the facts above stated, says:

"To the general rule that notice to an agent while he "is engaged in transacting business for his principal, of "matters relating to such business, is notice to the prin- "cipal, there is an exception which is as well-settled as "the rule itself. The exception is, that when in the

" transaction of business entrusted to him by his princi-
" pal the agent really acts for his own benefit or for the
" benefit and advantage of the other party to the trans-
" action, notice to him is not deemed constructive notice
" to his principal (Benedict *vs.* Arnoux, 154 N. Y., 715;
" Dillaway *vs.* Butler, 135 Mass., 479; DeKay *vs.* Hacken-
" sack Water Co., 38 N. J. Eq., 158). The facts of this
" case bring it clearly within the exception stated and
" applied in the cases just cited.

" When an agent assumes to act upon account of his
" principal, and at the same time is to share in the profits
" which the other party to the contract may gain in the
" business transacted, the agent cannot be said to be act-
" ing in that matter in good faith towards his principal,
" but he is really acting for himself as well as for the
" benefit and advantage of the other party with whom he
" is to share the profits. This was the position occupied
" by Prince & Co. in the transaction by which Wallace &
" Co. became purchasers of the bonds in suit, and such
" being the case, any knowledge possessed by them, show-
" ing that some of the bonds purchased were issued for a
" purpose not authorized by law, is not to be imputed to
" Wallace & Co.

" It is further claimed by the defendant that Mr. M. F.
" Dickinson, one of the attorneys who passed upon the
" validity of the bonds, was also the agent of Wallace &
" Co. in that matter; that his opinion given to Prince &
" Co. shows that he had the ordinances under which the
" bonds were issued before him; and that the knowledge

"which he obtained therefrom must be imputed to Wal-
"lace & Co. In passing upon this contention of defend-
"ant, it will be sufficient to say that the evidence points
"to the fact that Mr. Dickinson was employed by Prince
"& Co. in the matter referred to, upon their own account,
"and not as the attorney of Wallace & Co. I do not over-
"look the fact, which is strongly urged by defendant,
"that during the negotiations Wallace & Co expressed
"themselves as not willing to rely upon the opinions of
"certain attorneys submitted to them by Prince & Co.
"concerning the validity of the bonds, and asked them
"for the opinion of Mr. Dickinson; but this circumstance
"is not inconsistent with the conclusion, which I think
"is sustained by a consideration of the entire evidence,
"that the opinion thereafter obtained from him was pro-
"cured by Prince & Co., upon their own account. The
"testimony of Sumner Wallace, of the firm of Wallace &
"Co., is that all of the legal opinions submitted to his
"firm, including that of Mr. Dickinson, were procured
"by Prince & Co., or by Coffin & Stanton. The only
"other witness giving evidence bearing upon the ques-
"tion is F. H. Prince, and he testified that Mr. Dickinson
"was employed by Prince & Co.; and there is nothing
"in his deposition from which the inference can be
"drawn that in the matter of employing Mr. Dickinson
"that firm was acting or supposed they were acting as
"agents of Wallace & Co., or that Dickinson was to be
"paid by the latter firm. Prince & Co. were directly
"interested in effecting the exchange of the Page Belting

"Company's stock for the bonds, by reason of the com-
"mission they were to receive from Wallace & Co., on
"the one side, and the profits they were to share with
"Coffin & Stanton on the other; and in view of this inter-
"est, it is not difficult to believe that after learning from
"Wallace & Co. that an opinion from Mr. Dickinson
"would be satisfactory to them, Prince & Co. may have
"obtained the opinion of that gentleman on their own
"account, so as to insure the success of the negotiations
"in which they were engaged. At any rate, the direct
"evidence of F. H. Prince is that Dickinson was em-
"ployed by Prince & Co., and for the reasons stated I
"am disposed to regard this statement as true."

It will be observed that the Circuit Court based its finding that Dickinson was the attorney of Prince & Co., and not the attorney of E. G. & E. Wallace, upon the general statement of F. H. Prince: "We employed at-
"torneys to make investigation, and to give an opinion
"as to the legality of the bonds. We employed Mr. M. F.
"Dickinson" (Rec., p. 246).

We think the Circuit Court erred in concluding that that general statement of Prince was inconsistent with and overcame the more specific testimony of Sumner Wallace as to the employment of Dickinson, namely: "We asked for the opinion of some attorney in Boston, "and decided to refer it to Mr. M. F. Dickinson" (Rec., p. 100), and "the Dickinson opinion was obtained after "by agreement, after I had said to Prince & Co. that I

"wanted an opinion from Dickinson" (Rec., p. 102). The testimony of Prince & Co., the acknowledged agent of E. G. & E. Wallace in the transaction (Finding 12, Rec., p. 24; Additional Finding No. 3, Rec., pp. 39-41), is perfectly consistent with the fact that his firm, as agents of E. G. & E. Wallace, employed Dickinson as attorney for their principals, and with the testimony of Sumner Wallace that he specifically requested Prince & Co. to procure the opinion of Dickinson, and that E. G. & E. Wallace, upon that opinion, and upon the certificate and opinion of Goldsby and Gleason, purchased the bonds (Rec., p. 100). But with this question we will deal more fully in discussing the insufficiency of the evidence to support the finding that Dickinson was the attorney of Prince & Co. and not of E. G. & E. Wallace.

We think it sufficiently appears from the findings made by the circuit court that the notice to Prince & Co. and to Dickinson of facts showing the invalidity of the bonds in question was notice to E. G. & E. Wallace.

It is an unquestioned rule of law that notice to an agent is notice to his principal concerning all matters involved in the transaction in which he acts for his principal.

Mechem on Agency, Sec. 718, and cases cited.
Story on Agency, Secs. 140, 140a, and cases cited.
2 Ram on Commercial Paper, Sec. 1003, and cases cited.

There can be no question here as to the sufficiency of

the facts communicated to Prince & Co., the agents of E. G. & E. Wallace, and by them communicated to M. F. Dickinson, Jr., the attorney employed to advise E. G. & E. Wallace as to the regularity of the issuance of the bonds in question and as to their validity.

"The rule as to what will constitute constructive notice " may be said to be, that whenever a party has knowledge " of any facts sufficient to put a prudent man upon in- " quiry, which, if prosecuted with ordinary diligence, " would lead to actual notice, he will be charged with " the knowledge that might have been acquired by such " diligence."

Mechem on Agency, Sec. 724, and cases cited.

The circuit court found that Prince & Co., as well as Dickinson, hal full knowledge (Rec., pp. 24, 41).

M. F. Dickinson, the attorney employed by F. H. Prince & Co., upon agreement with the firm of E. G. & E. Wallace, their principals, to inquire into the regularity and validity of the bond issue, and to render an opinion thereon for the guidance and protection of the firm of E. G. & E. Wallace, was equally, with Prince & Co., an agent of E. G. & E. Wallace. "The relation of attorney " and client is a relation of agency, and in its general " features is governed by the same rules which apply to " other agencies."

Mechem on Agency, Sec. 987.

If Mr. Dickinson was not the attorney of E. G. & E. Wallace in the transaction, then he was the sub-agent of E. G. & E. Wallace, employed as such by F. H. Prince & Co., upon the express direction of the firm of E. G. & E. Wallace.

"If the sub-agent be one whom the agent was expressly "or impliedly authorized to appoint, he is deemed to be "the agent of the principal, and notice to such sub-agent "would be notice to the principal, as in the case of the "other agents."

Mechem on Agency, Sec. 728.
Story on Agency, Secs. 452, 454.
Hoover *vs.* Wise, 91 U. S., 310.
Storrs *vs.* City of Utica, 17 N. Y., 104.
Boyd *vs.* Vandenberg, 1 Barb. Ch., 273.
Rourke *vs.* Story, 4 E. D. Smith, 54.
Lincoln *vs.* Battle, 6 Wend. (N. Y.), 475.

We submit that, upon the face of the record, it appears that the circuit court erred in holding that notice to F. H. Prince & Co., the agents of E. G. & E. Wallace, was not notice to their principals, because said Prince & Co. were to receive a commission from Coffin & Stanton in the same transaction.

In deciding this question, the circuit court went a long step beyond anything decided in any of the cases cited and relied upon in the opinion, or any of the cases on this subject. The circuit court seems to have held that the

mere fact that the agent of a party may also be the agent of the other party, and may have some expectation of compensation from that other party in case the transaction be completed, alone, and in, and of itself, prevents the imputation of his knowledge to either principal.

We submit that this is going too far, and that the cases relied upon, when fairly construed, at most only go to the extent that where the agent, although such, is not really and *pro hac vice* an agent, or where the agent is himself engaged in or privy to a fraud to be committed upon his principal, in such cases his knowledge is not to be imputed.

The facts of our case plainly fail to bring it within any of the cases referred to by the circuit court. There can be no pretense that Prince & Co. were attempting to defraud their principals, or that they thought they were being guilty of any wrong doing. No reason is suggested from the findings or from the testimony why they would not willingly have communicated any knowledge they had to their principals, or, rather, why they should have intentionally and purposely endeavored to conceal it from them. They did communicate the very knowledge in question, and vitally material here, to the principal Dickinson, and there can be no presumption that there was any collusion between them and Dickinson, and there can be no reason founded upon any of the cases why the knowledge of Dickinson should not be imputed.

The mere fact that Prince & Co. were agents for both Coffin & Stanton and E. G. & E. Wallace in the transac-

tion in question is not enough to defeat the presumption that an agent communicates his knowledge concerning the subject of the agency to his principal.

Witter *vs.* McCarthy (Cal.), 43 Pac., 969.

There is a late United States Supreme Court case which reviews the same authorities cited and relied upon by Judge De Haven and many others. The *ratio decidendi* is that where the agent acts for both sides *and is* guilty of a fraud, or is attempting a fraud against one principal, that principal is not to have imputed to him the knowledge of the agent, and some of the cases seem to put it on the ground that under the circumstances it is *conclusively* shown, or at least palpably, that the agent would not have communicated the fact to the principal —a very different proposition from that formulated by the circuit court below (See Rec., p. 53).

American Surety Co. *vs.* Pauly, 170 U. S., pp. 149-159.

It will be noted that the American cases are based upon, and profess to follow, the rule as laid down by the English cases. One of these English cases, Badley *vs.* Riches, 9 Ch. Div., p. 189, is a very strong case, and seems to us conclusive against the reasoning and holding of Judge De Haven. The syllabus reads:

"The presumption that a solicitor has communicated "to his client facts which ought to have been made

"known, cannot be rebutted by proof that it was to the "solicitor's interest to conceal the facts."

The court said, p. 196: "It is said that Riches, the "agent, had an interest not to communicate, because it "is possible that the transaction might have gone off, "and he then would not have obtained the benefit which "he did by that mortgage; but I will not lay down as a "rule that where a solicitor owes a duty on the one side "and has an interest on the other side, the presumption "arises that he follows his interest and not his duty. I "shall, on the contrary, presume that in this case he per- "formed his duty, even although it was against his in- "interest." In Rolland *vs.* Hart, Law Reports, 6 Ch. App., 681, 683, Lord Hatherly said: "It has been held over "and over again that notice to a solicitor of a transac- "tion, and about a matter as to which it is part of his "duty to inform himself, is actual notice to the client. "Mankind would not be safe if it were held that under "such circumstances a man has not notice of that which "his agent has actual notice of. * * * It cannot be "left to the possibility or impossibility of the man who "seeks to affect you with notice, being able to prove that "your solicitor did his duty in communicating to you "that which, according to the terms of your employment "of him, was the very thing which you employed him to "ascertain. * * * " "It must be made out that a "distinct *fraud* was intended in the very transaction, so "as to make it necessary for the solicitor to conceal the "facts from his client in order to defraud him."

The notice is actual, not constructive. The notice which affects the principal does not depend upon whether it is comunicated to him or not, and therefore the presumption of non-communication is not the proper principle to apply. Rather, the commission of the fraud breaks off the relation of principal and agent, or is beyond the scope of the authority, and therefore prevents a possibility of imputing the knowledge of the agent to his principal.

Espin *vs.* Pemberton, 3 De Gex & Jones, 553.
Allen *vs.* The South Boston, 150 Mass., 206.

While in Frankel *vs.* Hudson there may be dicta going too far, the facts and the cases cited correct the error. The Kansas case cited shows the principle better and so explains Frankel *vs.* Hudson. The facts in both were that *pro hac vice* there was *no agency* at all, which brings these cases in line with the *ratio* quoted from 3 De Gex & Jones, and 150 Mass. The Missouri case, cited in the Encyclopedia, professes to follow the cases in England, Massachusetts, and Alabama, though some dicta may go further. But in our case the facts are different, and there is no presumption, certainly no clear presumption, that the agent would not communicate.

Hickman *vs.* Green, 27 S. W., 442.

In the first decision, the general rule was applied.

Hickman *vs.* Green, 22 S. W., 455.

The Wisconsin case, cited 1 Encyclopedia, p. 1145, is in favor of defendant. It follows the line of cases like those from Kansas and Alabama, where the officer was not agent *pro hac vice*, and cites cases and lays it down that if he does act as agent, although he has himself an interest, or acts in a double capacity, the general rule applies. See Loring *vs.* Broder, 134 Mass., 458, which seems in point, especially as there is no showing that Prince & Co. *supposed they were engaged in a wrongful transaction.*

In re Pilkington Bank, 58 N. W., 784.
Witter *vs.* McCarthy, 43 Pac. Rep., 969.

In the case from 65 Fed., cited in the Encyclopedia, there were two opinions, and the *ratio* of each clearly distinguishes the case from this one. That of Judge Taft is that the general rule imputing the agent's knowledge to the principal is based on his duty to communicate to the principal his knowledge respecting the subject-matter of negotiation, and the presumption that he will perform that duty. But such presumption cannot be indulged where the facts to be communicated would convict the agent of an attempt to deceive and defraud the principal.

The *ratio* of Judge Severens is that the agent had deserted his place as agent, and taken up a position opposed to his principal, and so there could be no presumption of information through a channel which was closed;

that, in fact, the party whose knowledge was sought to be imputed was not agent *pro hac vice*.

With 65 Fed. the case in 170 U. S. substantially accords.

See, also:

2 Pom. Eq. Jur., Secs. 666, *et seq.*

The law concerning notice of defects to the bondholder is well stated in Burroughs' Public Securities, thus (page 361): "The holder of a municipal bond who is "protected from the defects in their issue is one who "has no knowledge of the defects, for if he knows of "these defects, he is placed upon precisely the same foot-"ing as the original parties to the transaction. Any "defense that would be good between the maker of the "paper and the payee would be good as to subsequent "holder who had notice of the equities or defects set up "as a defense to the bonds. We have heretofore consid-"ered the question of how far the recitals in the bonds "themselves were notice to the purchaser of defects, and "the doctrine announced was that they were not only "notice of defects appearing on the face of them, but "when they put a party upon inquiry he was deemed "to have all information that, by reasonable diligence "in the prosecution of that inquiry, he could obtain. "Notice is not confined to recitals of the bonds. It is "immaterial how the purchaser gets the information "that there are defects in the issue of the bonds; it is the

"fact that he has knowledge of the defects that binds "him and puts him in the same position as the original "payee of the bond, who is bound to see that all the "conditions of issue have been fully complied with. In "City of Lexington *vs.* Butler, 14 Wall., 382, the plea, "which was a good one, sets out the facts, which showed "that the bonds had been improperly and fraudulently "put in circulation, and then averred that the plaintiff "had notice of these facts. This plea, if sustained by "proof, would have defeated the holder. In Coos Co. *vs.* "Green, 66 Mo., 498, where holder was affected with no- "tice of fraud in the issue of bonds, the bonds were di- "rected to be given up and canceled."

See:

Hopple *vs.* Wipple, 33 Ohio St., 116.
Harshman *vs.* Bates Co., 92 U. S., 569-575.
Bates *vs.* Winters, 97 U. S., 85-91.
McClure *vs.* Township Oxford, 94 U. S., 429.

In the last named case, the purchaser was presumed to know that the notice of thirty days before election had not been given. The recital informed him of the day of the election, and directed him to the law under which the bonds were issued, which, in express terms, announced to him that it did not take effect until published in a particular newspaper; and being thus put upon inquiry, it was his duty to ascertain when the law was published and did go into effect, and he will be

chargeable with such information as by reasonable diligence he could have ascertained. Chief Justice Waite remarked:

"To be a bona fide holder, one must be himself a pur-
"chaser for value without notice, or the successor of one
"who was. Every man is chargeable with notice of that
"which the law requires him to know, and of that which,
"after being put upon inquiry, he might have ascertained
"by the exercise of reasonable diligence. Every dealer
"in municipal bonds, upon which their face refer to the
"statute under which they were issued, is bound to take
"notice of the statute and of all its requirements."

McClure *vs.* Township Oxford, *supra.*
Burroughs, Public Securities, p. 331.

Notice is of two kinds—express and implied.

Express notice embraces not only what may fairly be called knowledge, from the fact that it is derived from the highest evidence to be communicated by the human sense, but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated.

Wade on Notice, p. 5.
16 Am. & Eng. Ency. Law, "Notice," p. 790.

Implied notice is the doctrine of actual notice implied by circumstances (actual matter in the second degree).

It necessarily involves the rule that a purchaser, before buying, should clear up the doubts which apparently hang over the title by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which, by ordinary diligence, he would have ascertained. He has no right to shut his eyes against the legal light before him. He does a wrong not to heed the "signs and signals" seen by him. It may be well concluded that he is avoiding notice of that which he, in reality, believes or knows. Actual notice of facts, which, to the mind of a prudent man, indicate notice, is proof of notice.

Krepp *vs.* Bailey, 79 Me., 195.

The Courts, following the dictates of public policy and positive law, hold that municipal bonds issued for a private purpose are void.

Call *vs.* La Grange, 113 U. S., 1.
Simonton, Bonds, Sec. 33, Sec. 39, Sec. 40, Sec. 41.
Cooley, Taxation, Chapter IV.
Cal. Constitution, Sec. 31, Art. IV.
Simonton, Bonds, Secs. 150-151.

Notice to agents is notice to principal.

The notice given by the statutes or ordinances under which a bond was issued binds principals directly, or

binds them indirectly through their agents. An agent is one who represents another, called a principal, in dealing with a third person, and such representation is called agency.

Cal. Civil Code, Sec. 2295.

An agency may be either actual or ostensible. It is actual when the agent is really employed by the principal. It is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.

Cal. Civil Code, Secs. 2298-2300.

By keeping the fruits of an unauthorized act of his agent, the principal ratifies the act and makes it his own.

Cal. Civil Code, Sec. 2310.

It is the rule that the knowledge of the agent is the knowledge of his principal, and that notice to an agent within the scope of his agency is notice to the principal.

Cal. Civil Code, Sec. 2332.
1 Wait's Act. Def., 231.
Bennett *vs.* Buchan, 76 N. Y., 386.
Jackson *vs.* Laflin, 103 U. S., 800.
Smith *vs.* Ayer, 103 U. S., 320.

The Courts of California have applied the rule that notice to agent binds the principal in the case of an unrecorded prior mortgage.

In Donald *vs.* Belas, 57 Cal., 399, it was held that if an agent, at the time of effecting a purchase, have knowledge of an unrecorded mortgage, his principal is affected thereby. In this case, everything in connection with the mortgage itself and the abstract which he got from the attorney, and upon the face of which he claims to have purchased, put him upon inquiry. They notified him of something beyond. It was such notice as would have led any honest man, using ordinary caution, to make further inquiry before purchasing. Notice of any fact calculated to put him on inquiry is, in the absence of explanation by him, sufficient to charge him with notice of all instruments and facts in connection with them which an inquiry would have disclosed. The rule is thus stated by Belden, J., in *Williamson* vs. *Brown*, 15 N. Y., 363: "That when a purchaser has knowledge of any fact "sufficient to put him on inquiry as to the existence of "some right or title in conflict with what he is about to "purchase, he is presumed either to have made the in-"quiry and ascertained the extent of such prior right, or "to have been guilty of a degree of negligence equally "fatal to his claim to be considered as a bona fide pur-"chaser." Besides, the attorney who prepared the abstract acted as such for both assignor and assignee. He had acquired a knowledge of the fact of the priority of

the registration of the plaintiff's mortgage. * . . * * Acting as he did, in the capacity as attorney or searcher for both the assignor and the assignee, it was his duty to make his knowledge known to the assignee. The knowledge of an attorney is the imputed knowledge of his client. It is the well settled doctrine of English law that if the agent, at the time of effecting a purchase, have knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. "The general rule," said Mr. Justice Bradley, in the Distilled Spirits Case, 11 Wall., 367, "that a principal is bound by the know-"ledge of his agent is based upon the principle of law "that it is the agent's duty to communicate to his prin-"cipal the knowledge which he has respecting the sub-"ject-matter of negotiation, and the presumption that "he will perform that duty."

In a leading case it was held:

"Notice of equities of an infirmity of title to an attor-"ney, counsel, or agent, acquired during negotiations "for a purchase is constructive notice to the client or "principal, and such constructive notice is conclusive "and irrebutable; and if an unrecorded deed under "which the client must rely for the title purchased is "shown to his attorney, he is chargeable with notice of "marks of infirmity appearing upon the face of said "deed, and is bound by its legal effect, regardless of the "error of the attorney in misinterpreting the instru-

"ment, or of his neglect to inform his client of such in-
"firmity. It appears, and is found as a fact, that Sutro
"had no actual knowledge of any of the foregoing facts
"on which the question of notice turns. The only notice
"which he had was that which the law attributes to him
"from its having been brought to the knowledge of his
"attorneys. Knowledge by notice to attorney, or coun-
"sel, or agent acquired during the negotiations for a
"purchase is constructive notice to their principal. If
"it were otherwise it would cause great inconvenience,
"and notice would be avoided in every case by employ-
"ing agents (see cases cited in 2 Lead. Cas. Eq., pt. 1, pp
"133, 134). That notice to an agent is notice to the
"principal, has been held in this State ever since Con-
"nolly *vs.* Peck, decided in 1856, and reported in 6 Cal.,
"348; followed in May *vs.* Morrell, 12 Cal., 91; Stanley
"*vs.* Green, 12 Cal., 148; Hunter *vs.* Watson, 12 Cal.,
"363. Notice to counsel or attorney is constructive no-
"tice to client Bierce *vs.* Red Bluff Co., 31 Cal., 161,
"and Donald *vs.* Beals, 57 Cal., 399). All these cases in
"regard to an agent apply to an attorney or counsel, for
"they are a species of agent. Justice Bradley, in the
"Distilled Spirits Case, 11 Wall., 367, states the princi-
"ple on which the rule rests. * * * It will be of no
"avail to the purchaser that the agent omitted to com-
"municate what he ascertained to his principal (Wil-
"liamson *vs.* Brown, 15 N. Y., 359). In other words,
"one who acts through another will be presumed to

"know all that the agent learns during the transaction, "whether it is actually communicated to him or not. "There is no difference in this respect between actual "and constructive notice; for if there were, an agent "would be employed whenever it was convenient to re- "main in ignorance" (Bank of United States *vs.* Davis, 2 Hill, 451-461). Or, as the reason of the rule was stated by Lord Brougham: "Policy and the safety of the pub- "lic forbid a man to deny knowledge while he is so deal- "ing as to keep himself ignorant, or so that he may keep "himself ignorant, and yet all the while let his agent "know and himself profit by that knowledge" (Ken- "nedy *vs. Green*, 3 Mylne & K., 699-719). It is plain that the ordinary dealings of men could not be carried on without imperiling the rights of property to a degree which could hardly be conceived, and infinite wrong done to innocent persons, unless the rules above pointed out were established canons of law. In this case, as the record shows, there can be no pretense that Wallace & Co. did not know that Prince & Co. were acting for Coffin & Stanton; and consequently any possible relaxation of the rule of imputed notice and any exception to the operation of that rule which can be suggested as growing out of the dual nature of the agency, can have no force or application.

Pine Mountain Co. *vs.* Bailey, 94 Fed., p. 260, etc.

The Circuit Court erred in finding that M. F. Dickinson was the attorney of Prince & Co., and not the attorney of E. G. & E. Wallace, and in refusing to find that said Dickinson was the attorney of E. G. & E. Wallace, employed for them, upon their express direction, by their agents, Prince & Co. (Specifications of Error, supra. Assignments of Error, No. 23, Rec., pp. 269-272; No. 29, Rec., pp. 275-77, No. 30, Rec., p. 277; No. 31, Rec., pp. 518-19. Exceptions, Rec., pp. 253, 254-7, 257. Findings, Rec., pp. 24, 39-41).

That the circuit court erred in refusing to make the additional finding of fact requested by defendant, and set forth in specification of error, is, we think, sufficiently shown by the testimony cited and quoted in said specification. The circuit court, in refusing to make the finding requested, as set forth in said specification, made additonal finding number 3 (Rec., pp. 39-41, Specifications of error), covering much of the same matter, but differing from the finding requested essentially in the following particulars:

1. In said additional finding number 3, the Court, referring to the employment of M. F. Dickinson, Jr., an attorney-at-law, practicing in the city of Boston, to make an investigation or examination concerning the validity of the refunding bonds afterwards purchased by E. G. and E. Wallace, says: "F. H. Prince & Com-"pany thereupon suggested that the opinion of M. F.

"Dickinson, Jr., an attorney practicing in that city, "should be obtained. This suggestion was satisfactory "to E. G. and E. Wallace, and it was then agreed be- "tween F. H. Prince & Company, and E. G. and E. "Wallace, that the opinion of said Dickinson upon the "question of the validity of said bonds should be ob- "tained by F. H. Prince & Company" (Rec., pp. 39-40). This portion of the additional finding makes it appear that F. H. Prince & Company suggested the employment of Dickinson to make the investigation and render the opinion, and that E. G. and E. Wallace simply assented to the suggestion of Prince & Company, whereas the testimony of Mr. Sumner Wallace, who represented the firm of E. G. and E. Wallace, in the negotiations which resulted in the purchase of the bonds assigned by them to plaintiff for collection was, "We "(referring to his firm) asked for the opinion of some "attorney in Boston, and decided to refer it to Mr. M. "F. Dickinson, Jr., attorney for the American Loan & "Trust Company, and his opinion was obtained, which "I have here. Those opinions being favorable, I pur- "chased the bonds" (Rec., p. 100).

Further testifying, Sumner Wallace said: "The "Goldsby and Gleason opinions were submitted to us "without consultation with us, but the Dickinson opin- "ion was obtained after, by agreement, after I had said "to Prince & Company that I wanted an opinion from "Dickinson" (Rec., p. 102).

The finding on that subject requested by defendant

(plaintiff in error here) was as it appears to us conservative and well within the proof. That the variance between the evidence and finding on this proposition is material is sufficiently evidenced by the conclusion of the circuit court; that the circumstances under which Mr. Dickinson was employed to make the investigation and render the opinion afterwards relied upon by E. G. and E. Wallace in purchasing the bonds, made him the attorney of F. H. Prince & Co., and not the attorney or representative of E. G. and E. Wallace.

2. Further, in said additional finding number 3, the circuit court finds: "F. H. Prince & Company then, on "their own account, and for themselves, and not acting "as agents of E. G. & E. Wallace, employed said Dick- "inson to give his opinion in relation to the validity of "such bonds" (Rec., p. 40). We submit that this very material finding that F. H. Prince & Company employed Dickinson "on their own account, and for them- "selves, and not acting as agent of E. G. and E. Wal- "lace," whether it be regarded as a conclusion of law or as a finding of the ultimate fact, is erroneous, is contrary to the testimony of Sumner Wallace, above cited, is not supported by any other evidence, and we submit that there is no evidence contrary to or inconsistent with the testimony of Sumner Wallace, above cited upon the proposition involved in said portion of said additional finding number 3.

We therefore submit that the circuit court erred in

refusing to make the amendment to finding number 12, requested by defendant, and also erred in making said additional finding number 3, which we assert is contrary in the particulars above stated to all of the evidence in the case upon the questions or issues involved in said portions of said additional finding number 3.

III

THE SO-CALLED REFUNDING ACT UNDER WHICH SAID BONDS AND COUPONS WERE ISSUED IS UNCONSTITUTIONAL *(Error No. 1, Rec., p. 260; Error No. 34, pp. 285-6; Error No. 49, p. 292; Error No. 51, p. 297; Error No. 59, p. 301).* Specifications. Supra pp 41, 81, 91, 108, 118.

The entire refunding bond issue, including the bonds and coupons here in question, was void, because the statute of March 1, 1893 (Stats. Cal., 1893, pp. 59-60), authorizing cities in the State of California, other than cities of the first class, to refund their outstanding indebtedness, evidenced by bonds and warrants thereof, is unconstitutional in the following particulars:

1. Because it is a local and special law, relating to a subject concerning which the constitution, article IV, section 25, requires all laws to be general.

2. It provides for the impairment of the obligations of then existing contracts, contrary to the provisions of Article I, Section 16, of the Constitution of California, providing, "No * * * law impairing the obliga-

"tion of contracts shall ever be passed." It also violates the corresponding provision of the Federal constitution: "No State shall * * * pass any * * * "law impairing the obligation of contracts" (Art. I, Sec. 10).

3. Because it authorizes the issuance of bonds payable more than forty years from the time of contracting the indebtedness sought to be refunded, contrary to the provisions of Section 18, Article XI, of the Constitution of California.

(1). The Constitution of California, Article IV, Section 25, prohibits the passage of any local or special law by the legislature relating to any of the subjects therein enumerated, and "in all other cases where a "general law can be made applicable" (Sub. 33).

The complaint shows upon its face that the bonds in question were issued under the act of March 1, 1893, "authorizing the common council, board of trustees, "or other governing body of any incorporated city or "town, other than cities of the first class, to refund its "indebtedness, issue bonds therefor, and provide for "the payment of the same" (amended and approved March 1, 1893).

The act in question is local and special because *it excludes from its operation cities of the first class,* while extending its privileges to all other classes of cities in the State of California.

Const. Cal., Art. IV, Sec. 25, Sub. 33, supra, p. 28.

To this point we cite:

City of Pasadena *vs.* Stimson, 91 Cal., 249.
Bruch *vs.* Colombet, 104 Cal., 351.
Darcy *vs.* Mayor of San Jose, 104 Cal., 642.
Welch *vs.* Bramlet, 98 Cal., 224.
Dougherty *vs.* Austin, 94 Cal., pp. 604, and 632 to 636.
(See also opinion of Mr. Chief Justice Beatty, Ibid., 620.)
Ex parte Westerfield, 55 Cal., 550.
Farrell *vs.* Board of Trade, 85 Cal., 408.
People *vs.* Fadden, 81 Cal., 499.
Earle *vs.* Board of Education, 55 Cal., 491.
Desmond *vs.* Dunn, 55 Cal., 242.
Miller *vs.* Kister, 68 Cal., 145.
People *vs.* Hoffman, 60 Howard Pr. (N. Y.), 324.
Sun Mutual Ins. Co. *vs.* Mayer, 4 Selden (N. Y.), 241.
Ayer's Appeal, 122 Pa. St., 266.
State *vs.* Hammer, 42 N. J. L., 439.
Lodi *vs.* State, 51 N. J. L., 402.
People *vs.* McConville, 35 N. Y., 449.
People *vs.* Supervisors, 43 N. Y., 13 to 21.
City of Topeka *vs.* Gilette, 32 Kansas, 431.

The refunding act of 1893 (Stats. Cal. 1893, page 59), under which the bonds in question were issued, is plainly obnoxious to several provisions of the Constitution of California prohibiting the passage of local and

special laws by the legislature. It requires no argument to show that the act is local in its operation, because by its terms all cites of the first class are excluded from its operation. It requires no argument to show that it is special, because, by its terms, rights, privileges and immunities which are expressly granted to cities other than cities of the first class are by the terms of the act denied to cities of the first class. The act provides for the assessment and collection of taxes in the cities to which it is made applicable, while excluding from its operation cities of the first class. That provision is to be found in Section 1, of the act, and is as follows:

"Said common council or other governing body "shall, at the time of fixing the general tax levy for "each year, and in the same manner for such tax levy "provided, levy and collect annually each year sufficient "money to pay one-fortieth part of the principel of "such bonds, and also the annual interest upon the "portion remaining unpaid, while the constitution prohibits the legislature from passing any local or special laws "for the assessment or collection of taxes."

Const. of Cal., Art. IV, Sec. 25, Sub. 10.
Const. of Cal, Art. XI, Sec. 12.

Again, the statute in question grants certain special and exclusive rights, privileges and immunities to municipal corporations, other than cities of the first

class, which are expressly denied to cities of the first class, namely, the right to refund their indebtedness, evidenced by bonds and warrants, upon the terms authorized by the act, whereas, the constitution expressly prohibits the legislature from passing any local or special law "granting to any corporation, association or "individual any special or exclusive right, privilege or "immunity."

Const. of Cal., Art. IV, Sec. 25, Sub. 19.

It manifestly appears that the subject of the act is one to which a general law can be made applicable, and it is impossible to conceive of any necessity or reason for discriminating between cities of the first class and cities of other classes in the matter of refunding their bonded indebtedness, yet the constitution prohibits the legislature from passing any local or special law in any case "where a general law can be made "applicable."

Const. of Cal., Art. IV, Sec. 25, Sub. 33.

Constitution mandatory.

These constitutional limitations are the more imperative because the constitution expressly declares that they are not directory, but mandatory and prohibitory: "The provisions of this constitution ARE MANDATORY

"AND PROHIBITORY, unless by special words they are de-
"clared to be otherwise."

Const. Cal., Art. I, Sec. 22.

Limitations present judicial questions.

Under this provision the Supreme Court of California has uniformly held that all questions concerning the constitutionality of local and special laws are JUDICIAL QUESTIONS to be determined by the court in upholding and enforcing the limitations of the constitution, regardless of any conclusion reached or acted upon by the legislature in that behalf. In the case of Darcy *vs.* The Mayor of San Jose, *supra*, the court, in the course of an elaborate review of this constituional limitation upon special legislation, says: "The de-
"murrer is upon the ground that the act of the legisla-
"ture upon which plaintiff relies is unconstitutional
"and void because, (1) It contravenes Subsivision 29,
"Section 25, Article IV, of the Constitution. It con-
"fers special privileges upon policemen, and imposes
"burdens upon cities, arbitrarily selected from those
"which stand in the same relation to the subject of the
"law, and the classification contained in the act is not
"founded upon any constitutional distinction. * *
"* The city of San Jose was incorporated by special
"act of the legislature, March 17, 1874. * * * It is
"said by appellant that the legislature may classify
"the municipal corporations (Const., Art. XI, Sec. 6),

"and may amend this classification at any time. That "a law is general which operates upon all of a class. "The manner of the classification is for the legislature "(People *vs.* Henshaw, 76 Cal., 442). By this act the "legislature amended the act of 1883 classifying cities, "and made a class containing from ten thousand to "twenty-five thousand inhabitants. The law applies "alike to all within the class. It is, therefore, a gen- "eral law.

"The statute in question says nothing about classify- "ing. Counsel is right, however, as to the construc- "tion of this statute. Every special law classifies, un- "less applied to named individuals, and hence, by this "logic, no limitation is imposed upon the power of the "legislature by the numerous constitutional provisions "against special law. To illustrate: It is desired to "raise the salary of a police officer in San Jose. It "cannot be done by a special law saying the salary of "James Darcy is hereby raised from seventy-five to one "hundred dollars per month. But it can as easily be "done by simply designating a class which shall in- "clude Darcy, and may not include any one else. In "Dougherty *vs.* Austin, 94 Cal., 601, it is said: 'If there "'is any one feature of the constitution more marked, "'any characteristic more pervasive than all others, it "'is this oft reiterated, this general and specific inhibi- "'tion of local and special laws.' And yet if they can "be thus easily evaded, how ineffectual and farcical "they are. Legislatures and courts are not at liberty

"to disregard a policy so plainly manifested in the "fundamental law. But while the sovereign will is "thus plainly expressed in the fundamental law, the "rule must not receive an interpretation too absolute. "It will not be presumed that it was intended to de- "prive the legislature of all power to adapt its laws to "the varying condition of its inhabitants. From ne- "cessity it has been held that the legislature may "classify in order that it may adapt its legislation to "the needs of the people. If this cannot be done, laws "will not always bear equally upon the people. *This* "*classification*, however, *must be founded upon differ-* "*ences* which are *either defined by the constitution or* "*natural*, and which will suggest a reason which might "rationally be held to justify the diversity in the legis- "lation. *It must not be arbitrary*, for the mere pur- "pose of classification, that legislation really local or "special may seem to be general, but for the purpose "of meeting different conditions naturally requiring "different legislation. (Dougherty *vs.* Austin, 94 Cal., "601; City of Pasadena *vs.* Stimson, 91 Cal., 238.)

"The true rule has been still more strongly ex- "pressed in numerous cases in other states. In Ayar's "Appeal, 122 Pa. St., 266, it is said: 'Some of the cases "'above cited have been quoted at considerable length "'for the purpose of showing why this court never in- "'tended to sanction classification as a pretext for spe- "'cial or local legislation. On the contrary, the under- "'lying principle of all the cases is, that classification,

"'with a view of legislating for either class separately,
"'is essentially unconstitutional, unless a necessity
"therefor exists—a necessity springing from manifest
"'peculiarities clearly distinguishing those of one class
"'from each of the other classes, and imperatively de-
"'manding legislation for each class separately that
"'would be useless and detrimental to the others.' *
"* * In State *vs.* Hammer, 42 N. J. L., 439, it is said:
"'But the true principle requires something more than
"'a mere designation of such characteristics as will
"'serve to classify, for the characteristics which thus
"'serve as a basis for classification must be of such
"'a nature as to mark the object so designated as
"'peculiarly requiring exclusive legislation. There
"'must be a substantial distinction, having a reference
"'to the subject-matter of the proposed legislation be-
"'tween the object or places embraced in such legisla-
"'tion, and the objects or places excluded. The marks
"'of distinction on which the classification is founded
"'must be such, in the nature of things, as will, in some
"'reasonable degree, at least, account for or justify the
"'restriction of the legislation.' This language has
"been often cited by other courts as a correct state-
"ment of the rule.

"In Lodi *vs.* State, 51 N. J. L., 402, it is said: 'The
"'rule is that in any classification, for the purpose of a
"'general law, all must be included and made subject
"'to it, and none omitted that stand upon the same
"'footing regarding the subject of legislation. To OMIT

"'ONE, SO CIRCUMSCRIBED, IS AS FATAL A DEFECT AS TO IN-
"'CLUDE BUT ONE of the number. * * *' Again, in
"Doughetry *vs.* Austin, 94 Cal., 60, it is intimated that
"the classification authorized is only for the pur-
"pose of incorcorpation and organization. This law
"can hardly be said to be for either purpose. * * *
"The law in question here, if the class specified
"would include San Jose alone, is a law limiting
"the discretion of the council of San Jose in re-
"gard to the compensation of policemen. There is
"nothing in the fact that the population is between
"ten thousand and twenty-five thousand which sug-
"gests a possible reason for excepting such municipal-
"ity from the general rule. No rational ground for
"the distinction appears. The classification is, there-
"fore, arbitrary and unauthorized."

Darcy *vs.* Mayor of San Jose, 104 Cal., 644 to 649.

In Bruch *vs.* Colombet, *supra*, the court, holding an act of the legislature classifying cities for certain school purposes, and providing one rule for school districts having boards of education, and a different rule for school districts not having such boards, to be local and special, and therefore, unconstitutional, says: "Of
"course, as has been frequently decided, the prohibi-
"tion of special and local laws cannot be evaded by
"arbitrary classification. In fact, a special law—
"special, as opposed to general laws on the one hand

"and private acts on the other—classifies the subjects "of the law for the purpose of the special provision. "This classification is the very thing prohibited by the "constitution. * * I think, therefore, special leg- "islation is prohibited, even when we can see, or think "we can, that special privileges are given to no one."

Bruch *vs.* Colombet, 104 Cal., 351-2.

In The City of Pasadena *vs.* Stimson, the Supreme Court, applying Sub. 33 of Section 25 of Article IV of the Constitution, held that part of the law relating to the exercise of the right of eminent domain, which discriminated between cities of the fifth and sixth classes, and other cities in the State, unconstitutional, and said: "It is true that the legislature is empowered by Sec- "tion 6 of Article XI of the constitution to classify "cities and towns in proportion to population, for the "purpose of incorporation and organization, and it is "undoubtedly true that a law limited to these purposes "is not unconstitutional because it makes different "regulations for different classes, but the mode of ex- "ercising the power of eminent domain, and the condi- "tions upon which it may be invoked, are no part of "municipal organization. They are the subject of gen- "eral laws applicable to every person alike, and the "legislature has no power to make arbitrary discrimi- "nation in this respect between different classes of "persons. * * * The conclusion is, that although

"a law is general and constitutional when it applies "equally to all persons embraced in a class, founded "upon some natural or intrinsic or constitutional dis- "tinction, it is not general or constitutional if it confers "particular privileges or imposes peculiar disabilities "or burdensome conditions in the exercise of a com- "mon right, upon a class of persons arbitrarily selected "from the general body of those who stand precisely "in the same relation to the subject of the law."

City of Pasadena *vs.* Stimson, 91 Cal., 249-251.

It was contended by petitioner's counsel in the circuit court, that the issuance of refunding bonds is to be distinguished from the exercise of the right of eminent domain, because, as stated in the Pasadena case, the power of eminent domain, and the conditions upon which it is invoked, are no part of municipal organization, while, according to his contention, the issuance of refunding bonds is a part of municipal organization. The distinction thus drawn by counsel seems to us to be without the slightest foundation in reason. If the acquisition of land for streets and squares, and other public uses, is no part of municipal organization, how can provision for paying for such land, or for refunding a bonded indebtedness incurred for such purposes, or for other public improvements, be a part of municipal organization? They stand upon the same footing precisely, belong equally to all municipal corpora-

tions, and it is in each case equally impossible to suggest any reason, founded in nature or in the Constitution, for discriminating among cities with respect to either incident of municipal government.

In the case of Earle *vs.* Board of Education, *supra*, the Supreme Court, discussing the constitutionality of an act classifying the public school districts of the State so as to apply a rule to cities of one hundred thousand inhabitants and over, different from the rule applied to teachers in cities and districts of smaller population, said: "A special law is one referring to a "selected class as well as to a particular object. This "act refers to a selected class, viz: teachers in cities of "one hundred thousand inhabitants," and the court accordingly held the act to be unconstitutional as special legislation.

Earle *vs.* Board of Education, 55 Cal., 489.

In *Ex parte* Westerfield, *supra*, the court held that a law is not general merely because it applies equally to all of a class arbitrarily defined, saying, "A general law "must be as broad as its object." Commenting upon this decision, Chief Justice Beatty, in Dougherty *vs.* Austin (94 Cal., 622), says: "Therefore, a law, the ob- "ject of which is to provide for the payment of county "expenses arising from unforeseen contingencies, must "be as broad as the State, FOR IT IS ABSURD TO SAY THAT "UNFORESEEN CONTINGENCIES WILL HAPPEN IN SOME "COUNTIES BUT NOT IN OTHERS."

In Miller *vs.* Kister, *supra*, the Supreme Court of California holds that the classification of counties, established by the act of 1883, for a legitimate purpose, cannot be made the basis of discriminating legislation, even when it relates to the compensation of county officers.

An examination of the decisions of the Supreme Court of California, from the time of the adoption of the constitution in 1879 to the present, discloses a growing tendency to enforce the limitations of the constitution upon special legislation more and more literally, in order to carry out the spirit and evident purpose of the constitutional convention and of the people in the adoption of that fundamental law, and this growing tendency is but the natural result of the clearer recognition of a strongly manifested fixed purpose on the part of the people and their representatives in the constitutional convention to circumscribe what they conceived to be a vicious system of legislation within the narrowest possible limits. In the language of Chief Justice Beatty, in Dougherty *vs.* Austin (94 Cal., 620): "If there is any one feature of the constitution more "marked, any characteristic more pervasive, than all "others, it is this oft reiterated, this general and spe- "cific inhibition of local and special laws."

There was certainly ample warning given by the Supreme Court of California to all the world before the passage of the act in question, that a local or special law of that kind would be held unconstitutional upon any and all of the grounds which we have discussed.

for the decisions in Dougherty *vs.* Austin, Pasadena *vs.* Stimson, Earle *vs.* Board of Education, and several of the other clear and strong decisions of the Supreme Court of California on this question, had been rendered and published long before the passage of the act. The act itself is so flagrantly at variance with the limitations of the constitution that it would seem to have been passed in defiance of the mandatory and prohibitory command of the constitution that the legislature of California shall not pass local or special laws on any of the subjects covered and provided for in this law.

In view of the very strong and clear position taken by the Supreme Court of California upon the question, it is hardly necessary to make any further suggestion concerning the right or propriety of judicial examination and enforcement of the limitations of the constitution upon special legislation, but if it were necessary to show affirmatively that a general refunding law "can be made applicable," that showing was made by the legislature of California itself in acts upon that subject passed both before and after the passage of the act in question.

Political Code of Cal., Sec. 4445, *et seq.*

County Government Act, Sec. 25, Sub. 14 (Stats. Cal. 1893, p. 353.)

The law being unconstitutional, the bond issue made under its provisions was absolutely and necessarily

void. No consideration of hardship can be urged in this case in favor of the bondholders, first, because they were bound to know whether the law under which the bonds were issued was constitutional or unconstitutional, and, secondly, because the city of Santa Cruz is at least as unfortunately situated as they are, the instruments which are sued upon as municipal bonds having been taken from the city of Santa Cruz, not by purchase, but fraudulently and without consideration by an act of grand larceny.

People *vs.* Smallman, 55 Cal., 185.
People *vs.* Shaughnessy, 110 Cal., 598.

IV.

THE SO-CALLED REFUNDING ACT UNDER WHICH THE BONDS AND COUPONS IN QUESTION PURPORT TO HAVE BEEN ISSUED DID NOT AUTHORIZE THE ISSUANCE OF ANY BONDS OR COUPONS BY THE CITY OF SANTA CRUZ (*Error No. 1, Rec., p. 260; Error No. 52, p. 299; Error No. 61, pp. 301-2; Refunding Act, supra*, p. 37. Special Features, Supra, p. 41, 109, 119.

The court will observe that there is an extraordinary hiatus in the refunding act of March 1, 1893. While the act in question gives power to the governing body of any city within the classes selected, to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its outstanding indebtedness, evidenced by bonds and warrants

ship, 132 U. S., 340; Hill *vs.* Memphis, 134 U. S., 198, 203; and Merrill *vs.* Monticello, 138 U. S., 673, 687, 691; in all of which the same rule of law was maintained.

In Hill *vs.* Memphis, supra, Mr. Justice Field, delivering the opinion of the court, said: "The inability "of municipal corporations to issue negotiable paper "for their indebtedness, however incurred, unless au- "thority for that purpose is expressly given, or neces- "sarily implied, for the execution of other express "powers, has been affirmed in repeated decisions of "this court."

In Merrill *vs.* Monticello, supra, it was held that the implied power of the municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if existing at all, did not authorize it to create and issue negotiable security to be sold in the market and to be taken by the purchaser free from the equities that might be set up by the maker; and that to borrow money, and to give a bond or obligation therefor, which might circulate in the market as a negotiable security, free from any equities that might be set up by the maker of it, were essentially different transactions in their nature and legal effect.

"It is a general and undisputed proposition of law "that a municipal corporation possesses and can exer- "cise the following powers, and no others:

"1. Those granted in express words;

"2. Those necessarily or fairly implied in or inci-
"dent to the powers expressly granted;

"3. Those essential to the declared objects and pur-
"poses of the corporation—NOT SIMPLY CONVENIENT, BUT
"INDISPENSABLE.

"Any fair, reasonable doubt concerning the exist-
"ence of the power is resolved by the court against the
"corporation, and the power is denied."

Dillon on Municipal Cor., (4th Ed.), Sec. 89.
Von Schmidt *vs.* Widber, 105 Cal., 157.
Ottawa *vs.* Carey, 108 U. S., 110.

"The rule of strict construction of corporate powers
"is applicable to grants of powers to municipal and
"public bodies which are out of the usual range or
"WHICH MAY RESULT IN PUBLIC BURDENS, or which, in
"their exercise, touch the right to liberty or property,
"or, as it may be compendiously expressed, any common
"law right of the citizen or inhabitant."

Dillon on Mun. Cor., 4 Ed., Sec. 91.
Von Schmidt *vs.* Widber, 105 Cal., 157.

"There is a marked distinction between the inci-
"dental powers that are implied in favor of the acts of
"a business corporation and those of a municipal cor-
"poration. The inability of a business corporation to
"avoid its obligation upon the plea of *ultra vires*, when

thereof, and specifies the manner in which such election shall be called and held, and the form of notice to be given of such election, there is no provision in the act, or in any other act or law, as to what shall be the result of a vote favorable to refunding at such election. It does not say, either in terms or in substance, that if the vote at such election be favorable to refunding, the city, or its governing body, or any officer or agent, shall have power to make or issue refunding bonds; but, immediately after providing for the election, and without any provision concerning the effects of the election, if favorable to refunding, it proceeds to describe bonds, the issuance of which it may or may not have been the intention of the legislature to provide for. To say the least, the act is very crudely and defectively drawn in that particular; and the conjectures or guesses concerning the meaning of that part of the act indulged and followed by the self-constituted governing body, and officers of the city of Santa Cruz, pretending to act under it, were as curious as the act itself is obscure.

Counsel for plaintiff, in their argument on the question of law raised by our demurrer to the amended complaint herein, in the circuit court, while admitting, practically, the deficiencies of the refunding act of 1893, contended, and may still contend, that such deficiencies, and the apparent defects of such act, are cured by its title; but we respectfully submit that the title of the act in question, instead of curing the de-

fects in the act, or aiding to support the construction that it authorizes the issuance of bonds, tends, on the contrary, to emphasize its weaknesses and to demonstrate its utter failure as an enabling act, authorizing the issuance of bonds.

It will be noticed that the act of March 1, 1893, is entitled as follows: "An act to amend an act entitled "'An act to authorize the common council, board of "'trustees, or other governing body of any incorpor-"'ated city or town, other than cities of the first class, "'to refund its indebtedness, issue bonds therefor, and "'provide for the payment of the same,' approved "March 15, 1883."

The title does not indicate an intention on the part of the legislature to authorize any incorporated city or town to issue bonds or provide for the payment of the same; but by its terms it is declared to be an act to amend an act that did authorize the issuance of bonds, and did authorize common councils and other governing bodies to provide for the payment of the same. The omission in the body of the act of March 1, 1893, cannot be attributed to accident or oversight, because the provision for issuance of bonds and making provision for the payment thereof was contained in the act of March 15, 1883, which this act of March 1, 1893, amended. Therefore, the legislature, *ex industria*, struck out of the act which it was amending all provision for the issuance of bonds.

In the circuit court, counsel, referring to this manifest and fatal omission in the statute, said that a provision in the act for the issuance of bonds by a municipality proceeding under the act, was not necessary, because such provision is contained in the Constitution of the State, and that the constitution becomes operative in that respect to authorize the issuance of bonds whenever the proceedings provided for in the Act of March 1, 1893, have been had and taken. We think counsel was unfortunate in this suggestion, AS THERE IS NO SUCH PROVISION IN THE CONSTITUTION, and counsel will look in vain for any such constitutional or statutory provision authorizing or under which the city of Santa Cruz could have issued these bonds.

It is well settled that, in the absence of express authority given either by the constitution or the statute, a municipality has no power to issue bonds, and that bonds issued by a municipality, without such statutory or constitutional authority, are absolutely void.

Wells *vs.* Supervisors, 102 U. S., 625.
Claiborne County *vs.* Brooks, 111 U. S., 400.
Concord *vs.* Robinson, 121 U. S., 165.
Kelly *vs.* Milan, 127 U. S., 139.
Brenham *vs.* German-American Bank, 144 U. S., 173.
Lehman *vs.* San Diego, 48 U. S. App., 681.
McCoy *vs.* Bryant, 53 Cal., 241.

In Brenham *vs.* German-American Bank, supra, bonds were issued by the city of Brenham, in Texas, in July, 1879, to the amount of $15,000, under the assumed authority of an act of the legislature of Texas incorporating the city and giving its council authority to borrow, for general purposes, not exceeding $15,000, on the credit of the city. It was held by the court that, notwithstanding its power to borrow money, the city had no authority to issue negotiable bonds since such authority had not been expressly conferred by statute, and that, therefore, even a bona fide holder of such bonds could not recover against the city on them or their coupons. In this well-considered case, after reviewing all of the authorities bearing on the question, the court lays down the rule that power in a municipal corporation to borrow money is not nugatory, although unaccompanied by power to issue negotiable bonds therefor, and that, as it is easy for the legislature to confer upon the municipality the power to issue such bonds, if it be not done, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, the power must be held not to exist.

In the course of its opinion on this question, the court took occasion to review its decisions in the cases of Police Jury *vs.* Britton, 15 Wall., 566; Claiborne County *vs.* Brooks, 111 U. S., 400; Concord *vs.* Robinson, 121 U. S., 165; Kelly *vs.* Milan, 127 U. S., 139; Norton *vs.* Dyersburg, 127 U. S., 160; Young *vs.* Clarendon Town-

"it has received and retained the consideration for its "obligation, has no application to a municipal corporation. The former is organized for the profit of its "members, and its executed acts in purported furtherance of that object, unless restrained by its charter, "or prohibited by positive law, will be upheld; whereas, municipal corporations are organized for governmental purposes, and invested with a portion of the "authority which properly appertains to the sovereign "power of the State, and can exercise only such powers "as are expressly conferred or necessarily implied."

Von Schmidt *vs.* Widber, 105 Cal., 157-8.

V.

IT APPEARS UPON THE FACE OF THE COMPLAINT AND BY THE FINDINGS OF FACT THAT THE BONDS AND COUPONS IN QUESTION, AND EACH AND ALL THEREOF, CONSTITUTED AN OVER-ISSUE OF BONDS, IN EXCESS OF THE LIMITATION IMPOSED BY LAW UPON THE CONTRACTION OF BONDED INDEBTEDNESS BY THE CITY OF SANTA CRUZ *(Rec., pp. 3, 18-20, 23; Error No. 1, p. 260; Error No. 44, p. 289; Error No. 45, p. 289; Error No. 52, p. 298; Error No. 60, p. 301).* Specifications, Supra pp. 41, 91-2, 109-118.

The findings (Rec., pp. 34-7, 44) show, as the complaint alleged (Rec., pp. 6, 7) that the refunding bond issue of $360,000 in question, added to the bonded indebtedness of the city of Santa Cruz outstanding at the

time of such issue, constituted more than 15 per cent. of the assessed value of all the taxable real estate and personal property of said city of Santa Cruz. This fact is established, regardless of the judgment of the court as to the validity of the $89,000, mortgage indebtedness of the City Water Company of Santa Cruz as a debt of the city of Santa Cruz subject to refunding. Even if the court should hold that that indebtedness of the private corporation was subject to refunding, yet the pleadings and findings show that the refunding bond issue increased the bonded indebtedness of the city of Santa Cruz to $631,000, or over 16 per cent. of the total assessed value of all real and personal property in the city of Santa Cruz.

By an act passed in 1891 (Stats. Cal. 1891, p. 84), amending a former act limiting the contraction of such indebtedness to a smaller percentage, it was provided (Sec. 5): "No city, town, or municipal corporation "shall incur an indebtedness for public improvements "which shall in the aggregate exceed 15 per cent. of the "assessed value of all the taxable real estate and per- "sonal property of such city, town, or municipal cor- "poration." The statute containing this limitation purported to authorize cities and towns to contract bonded indebtedness within that limit for public improvements. It was urged on the oral argument that this statute imposed a limitation only upon the contraction of such bonded indebtedness for public improvements, and had

no application to the creation of a bonded indebtedness for any other purpose. Assuming this to be so, although we dispute it, we are not driven to the necessity of discussing it, for we find that by the charter of the city of Santa Cruz (Stats. 1875-6, p. 193), a much more stringent limitation upon the contraction of such debts, or the issuance of such bonds, by the city of Santa Cruz, is imposed. Section 10 of that act is as follows: "The common council shall not create, audit, or allow, or permit "to accrue, any debt or liability above the actual revenue or available means in the treasury, that may be "legally apportioned and appropriated for such purpose; nor shall any warrant be drawn, or evidence of "indebtedness be issued, unless there shall be sufficient "money in the treasury legally applicable to meet the "same, except as hereinafter provided"; and the only provision thereinafter made for the contraction of any debt is found in Section 12 of the act, which authorizes the mayor and common council to provide for expenditures not exceeding ten thousand dollars, for any purpose authorized by the act, in excess of the revenue of the city for such purpose in the then fiscal year, and shall provide for the levy of a special tax for the payment of such debt in the same or succeeding fiscal year, provided that the special tax thus to be levied shall, for no one year, be more than one-half of one per cent. upon the assessed valuation of the taxable property. There is no provision in that act for any expenditure, except for

the salaries and supplies of officers and for public improvements.

Bonds issued in excess of limit fixed by law are void.

Doon Township *vs.* Cummings, 142 U. S., 366.
East Oakland *vs.* Skinner, 94 U. S., 255.
Lewis *vs.* Shreveport, 108 U. S., 282.
Marsh *vs.* Fulton County, 10 Wall., 676.
McPherson *vs.* Foster, 43 Iowa, 48.
North *vs.* Platt County, 29 Neb., 477.
Buchanan *vs.* Litchfield, 102 U. S., 276.
Litchfield *vs.* Ballou, 114 U. S., 190.
Dixon County *vs.* Field, 111 U. S., 83.
Lake County *vs.* Rollins, 130 U. S., 662.
Lake County *vs.* Graham, 130 U. S., 674.
Nesbit *vs.* Riverside Ind. Dist., 144 U. S., 610.
Lehman *vs.* San Diego, 83 Fed., 670-5.
Shaw *vs.* Ind. School Dist., 77 Fed., 277.

It was urged in the court below that the issuance of refunding bonds does not, in contemplation of law, increase the bonded indebtedness of a city issuing them, because the purpose of their issuance is to substitute them, as speedily as the transactions can be had, for the outstanding bonds to be cancelled by the refunding process; but it is well settled that the issuance of refunding bonds, except by way of immediate exchange for the bonds to be cancelled, does constitute an increase of the bonded indebtedness of the city, while both sets of bonds

are outstanding, and thus invalidates the refunding bond issue to the extent, at least, to which it exceeds the statutory or constitutional limitations. This question was elaborately discussed, and decided in accordance with our contention, in the case of Doon Township *vs.* Cummings, supra. In that case, the Constitution of Iowa limited the contraction of debts by county or other political or municipal corporations to 15 per centum on the value of taxable property within such county or corporation. Negotiable bonds were issued in excess of the constitutional limit by a school district, and sold by its treasurer for the purpose of applying the proceeds of the sale to the payment of the then outstanding bonded indebtedness of the district, pursuant to the statute of Iowa. The bonds, as in this case, were refunding bonds, and they were sold under a statutory authorization, coupled with the requirements that their proceeds should be applied to the payment of the outstanding bonded indebtedness of the district. In discussing the effect of the sale of these refunding bonds, the United States Supreme Court says: "There is a wide difference in the "two alternatives which this statute undertakes to au- "thorize. The second alternative, of exchanging bonds "issued under the statute for outstanding bonds, by "which the new bonds assume as issued to the holders "of the old ones, would be a substitute for and an ex- "tinguishment of them, so that the aggregate outstand- "ing indebtedness of the corporation would not be in- "creased, might be consistent with the constitution.

"But under the first alternative, by which the treasurer "is authorized to sell the new bonds, and to apply the "proceeds of the sale to the payment of the outstanding "ones, it is evident that if (as in the case at bar) new "bonds are issued, without a cancellation or surrender "of the old ones, the aggregate debt outstanding, and on "which the corporation is liable to be sued, is at once "and necessarily increased, and, if new bonds equal in "amount to the old ones are so issued at one time, is "doubled; and that it will remain at the increased "amount until the proceeds of the new bonds are ap- "plied to the payment of the old ones, or until some of "the obligations are otherwise discharged.

"It is true that if the proceeds of the sale are used by "the municipal officers as directed by the statute in pay- "ing off the old debt, the aggregate indebtedness will "ultimately be reduced to the former limit, but it is "none the less true that it has been increased in the in- "terval; and that unless those officers do their duty, the "increase will be permanent. It would be inconsistent "alike with the words and with the object of the consti- "tional provision, framed to protect municipal corpora- "tions from being loaded with debt beyond a certain "limit, to make their liability to be charged with debts "contracted beyond that limit, depend solely upon the "discretion or the honesty of their officers" (142 U. S., 371-2).

On the ground that the bonds in question in that case

were issued in excess of the limitation imposed by the Constitution of Iowa, they were held to be void, and the judgment of the circuit court upholding them was reversed, with instructions to enter judgment in favor of *Doon Township.*

See, also:

Shaw *vs.* Ind. School Dist., 40 U. S. App., 475; 77 Fed., 277.

In Dixon County *vs.* Field, supra, under a constitutional provision prohibiting any county, or other subdivision of the State, from making donation in the aggregation exceeding ten per cent. of assessed value, etc., the United States Supreme Court held that bonds issued by a county beyond ten per cent. of its assessed value were void, even in the hands of a bona fide holder, and although each bond, after stating the whole amount issued, stated that they were issued pursuant to an order of the county commissioner, and authorized by an election held on a certain day, and by virtue of certain statutes, and the constitution of the State, and bore a certificate of the secretary and auditor that "it was issued pursuant to law." "No recital," says the Court, "involving the amount of the assessed taxable valuation "of the property to be taxed for the payment of the "bonds, can take the place of the assessment itself, for "it is the amount as fixed by reference to record that is

"made by the constitution the standard for measuring "the limit of the municipal power" (111 U. S., 95).

In the case of Lake County *vs.* Graham, supra, the United States Supreme Court, discussing an effect of a similar limitation in the Constitution of Colorado, held that the county was not estopped, as against a bona fide holder for value, to show that the constitution has been violated by issuing bonds which recited the whole amount issued, and that they were issued "under and "by virtue and in full compliance with" a certain statute, and that "all the provisions and requirements of "said act had been fully complied with by the proper "officers in the issuing of these bonds" (130 U. S., 674).

These cases, and the other cases which we have cited, conclusively show, by reason and authority, that the sale or refunding bonds for the purpose of having the proceeds applied to the cancellation of existing obligations, do constitute an increase of the indebtedness of the municipality issuing them, to the extent of the face value of the refunding bonds so sold, and that where such increase is prohibited by any constitutional or statutory provision binding upon the municipality, the bonds are void, even in the hands of innocent holders for value. The court will observe that *there is no allegation, nor finding, nor proof in this action that a single one of the old bonds has ever been taken up.* It therefore appears that the bonded indebtedness of the city of Santa Cruz, as it existed on the 13th day of March,

1894, was doubled, or more than doubled, by the refunding bond issue.

In the circuit court counsel for petitioner referred to the fact that the Supreme Court of California, in the case of the City of Los Angeles *vs.* Teed (112 Cal., 319), had expressed the opinion than an issue of refunding bonds by a city did not increase the bonded indebtedness of such city. The Supreme Court of California was evidently mistaken in that suggestion. We use the term "suggestion" because the discussion of that question in the opinion of the Supreme Court is clearly *obiter dictum*, since the court held the bond issue under consideration in that case invalid because the bonds provided for the payment of the principal and interest to become due thereon, at a point outside of the State of California, to which the city treasurer of the city of Los Angeles could not legally either transport or transmit the funds of the city for the purpose of paying principal or interest on the bonds (112 Cal., 329-30).

Of course, the dictum of an august and learned tribunal such as the Supreme Court of California should be given serious consideration as argument, although it be not authority; but in the case of the City of Los Angeles *vs.* Teed it would seem that this rule does not apply with its usual force, because, in the opening statements of the opinion, on page 323, the court says: "The "case has not been as fully argued as its importance re- "quires, and some points absolutely indispensable to a "decision have not been at all referred to by counsel.

"This is especially to be regretted, as the questions in-
"volved are of great public importance, which we
"ought not to be asked to examine without the fullest
"assistance from counsel."

Certain it is that the conclusion reached by the Supreme Court of California, and announced in the dictum referred to, is directly at variance with the settled rule established by the decisions of the United States Supreme Court, and established by the common observation and experience of mankind. If an issue of refunding bonds to be sold for money, and the money afterwards to be applied to the redemption of previously outstanding bonds, does not increase the indebtedness of the city, it must follow that the plaintiff herein cannot maintain an action against the city of Santa Cruz, while the previously outstanding bonds remain unpaid.

If the alleged issue of refunding bonds in this case would not, if valid, constitute an increase of the indebtedness of the city of Santa Cruz, the circuit court should have dismissed this action, upon the ground that the city of Santa Cruz is not indebted to plaintiff, because it appears that the outstanding bonds for the redemption and refunding of which those bonds were issued, have not been paid, and that a refunding bond issue does not increase the indebtedness of the city issuing the bonds.

But it may be urged that the decisions of the United

States Supreme Court which we have cited referred to constitutional limitations upon the right of municipalities to incur indebtedness, while,, in this case, we are dealing with statutory limitations only. This contention cannot be seriously urged, for statutory provisions, being constitutional, are just as binding upon municipal corporations as constitutional limitations, and there is absolutely nothing in the refunding act of March 1, 1893, referred to in plaintiff's complaint, which, either directly or by implication, purports to repeal or amend, or in any way modify, any of the statutory limitations to which we have referred. Those statutory limitations are perfectly consistent with the act of March 1, 1893, and might have been incorporated in that act as provisos, without interfering with any of the provisions of the act, unless by subsequent development of fact it should appear that there were some cities within the selected classes that could not so refund their bonded indebtedness without exceeding the limitations. Of course, no other statute, the terms of which might have been incorporated as provisos in the act under consideration, *without necessarily interfering* with the accomplishment of its purpose, can be held to have been, by implication, repealed or amended by that act.

The court will observe that there is no repealing clause in the act of March 1, 1893, so that it makes no change in any statute other than the three sections of

the statute of 1883 which it purports to amend, unless such changes were made by *necessary* implication.

Again, we submit that the charter of the city of Santa Cruz, as enacted in 1876, could not, in the matter of refunding the bonded indebtedness of that city, be amended by the State Legislature by a general law, unless the city of Santa Cruz should elect to abandon its original charter, and to organize under the general law of the State relating to cities. The new constitution provides for the organization of cities and towns under general laws at the election of the cities thereof (Const., Art. II, Sec. 6), and provides that cities organized before the adoption of the constitution may, *by election*, organize under such general law. The complaint does not show that the city of Santa Cruz ever did elect to organize under any general law passed since the adoption of the constitution, and, in fact, the city of Santa Cruz has elected to continue its corporate existence and functions under the act of 1876 (Stats. 1876, p. 201).

It is well settled by the authorities which we have cited, and by other Supreme Court decisions which it would be quite superfluous to cite, that the legislature could not, by special act, amend Section 10 or Section 12 of the act constituting the charter of the city of Santa Cruz. The matter of refunding its bonded indebtedness is a business matter, belonging peculiarly to the exclusive province of the city of Santa Cruz itself under the present constitution; so that, if the re-

funding act had been general, instead of being local and special, as it is, it would still have been ineffectual to so amend the charter of the city of Santa Cruz as to authorize the issuance of the refunding bonds in question.

Recitals in bonds do not cure this defect.

It will, no doubt, be urged by counsel for plaintiff that, even though there was an issue beyond the limitation imposed by the statute of 1891, that fact cannot operate to defeat the bonds in the hands of innocent purchasers for value, but that such purchasers are protected, even against the over-issue, by the recitals contained in the bonds. The answer to this contention is, that there is no recital in the bonds to the effect that the amount of their issue was within the limitation imposed by the statute, and there is no reference in the recitals to the act of the legislature of the State of California of March 11, 1891, (Stats. Cal., 1891, p. 84), and no recital that the bonds were issued in compliance with that act.

In Buchanan *vs.* City of Litchfield, 102 U. S., 278, the bonds sued upon were declared invalid in the hands of a bona fide holder for value, because the amount of their issue, added to the theretofore outstanding indebtedness of the city of Litchfield, necessarily increased the indebtedness of such city beyond the 5 per cent. limitation imposed by the Constitution of Illinois (Constitution of Illinois, Art. IX, Sec. 12), and for the

reason that the bonds contained no recital of circumstances bringing them within the limit fixed by the constitution. In that case, the court, dealing with this very question, said: "Returning to the case in hand, it "will be observed that the bonds issued by the city of "Litchfield contain no recital whatever of the circum- "stances which, under the constitution of the State, "must have existed before the city could legally incur "the indebtedness for which the bonds were issued. "They purported, it is true, to be issued under the au- "thority of the act of April 15, 1873, and in pursuance "of the ordinance of the city based upon that statute. "But that statute does not expressly restrict the exer- "cise of the power to erect and maintain a system of "water works to cases in which the aggregate indebt- "edness of the city was within the limit which the con- "stitution declared no municipal corporation should "exceed. Nor does the same ordinance recite or state, "even in general terms, that the proposed indebted- "ness was incurred in pursuance of, or in accordance "with, the constitution of the State, or under the cir- "cumstances which permitted the issue of the bonds. "Consequently, a recital that the bonds were issued "under the authority of the statute, and in pursuance "of the city ordinance, did not necessarily import a "compliance with the constitution" (Ibid., 292).

In this case there is no recital in the bonds, either directly or inferentially, stating or suggesting that the

bonds were issued in conformity with the act of March 11, 1891 (Stats. 1891, p. 84). Nor is there any recital of circumstances tending to show that the bond issue was within the legal limit. Upon this specific question the court, in Buchanan *vs.* Litchfield, supra, says: "The "present action cannot be maintained unless we hold "that the *mere fact* that the bonds *were* issued, with- "out any recitals of the circumstances bringing them "within the limit fixed by the constitution, was, in it- "self conclusive proof, in favor of a bona fide holder, "that the circumstances existed which authorized "them to be issued. We cannot so hold."

To the same effect is the case of School District *vs.* Stone, 106 U. S., 183, in which certain bonds are declared invalid because of over-issue. The court held that a bona fide puhchaser for value was not protected by recital contained in the bonds, and in that action said: "But the recitals do not, as we have said, neces- "sarily import a compliance with the statute or the "fundamental law of the State upon that subject. "They necessarily imply nothing more than that the "bonds were issued by authority of the electors, and "that the election was held in conformity with the "statute. The statute may have been pursued as to "the notice required to be given of the time and place "of the election, and as to the manner in which the "will of the voters was to be ascertained, and yet it "may have been disregarded in respect to the limit it

"imposed upon district indebtedness. The declaration "therefore, that the election was held in conformity "with the statute, does not, with sufficient distinct- "ness, imply the indebtedness voted was less than 5 "per cent. on the value of the taxable property of the "district, as shown by the State and county tax "lists."

After referring to the doctrine of estoppel by recitals, as established by numerous decisions of the Supreme Court, the opinion continues: "But in all such "cases, as a careful examination will show, the recitals "fairly imported a compliance, in all substantial re- "spects, with the statute giving authority to issue the "bonds. We are unwilling to enlarge or extend the "rule now established by numerous decisions. Sound "public policy forbids it. Where the holder relies for "protection upon mere recitals, they should, at least, "be clear and unambiguous, in order to estop a muni- "cipal corporation in whose name such bonds have "been made, from showing that they were issued in "violation or without authority of law" (Ibid., 186-7).

All of the decisions of the Supreme Court of the United States, from Dixon County *vs.* Field, 111 U. S., 183, to Sutliff *vs.* Lake County Commissioners, 147 U. S., 230, agree that the purchasers of bonds issued by municipalities under the authority of law which limits the amount of bonds to be issued, at a certain percentage of the assessment rolls, or to a given rate of taxa-

tion based on such rolls, are charged with notice of the assessment rolls and of the amount of bonds which can be validly issued, based on such assessment rolls.

See, also:

Francis *vs.* Howard County, 13 U. S. App., 126, 165.

But, in addition to the constructive notice given to all purchasers and to all persons by the public statutes of the State, and the public records, including the assessment rolls, and the records of previous bond issues, it is clearly established by the evidence (Error No. 27, Rec., pp. 273-5; testimony, Rec., pp. 91 to 146) that nearly all of the holders of the bonds had actual notice that the amount of their issue, added to the then outstanding bonded indebtedness of the city of Santa Cruz exceeded 15 per cent. of the taxable valuation of the real and personal property in the city. Reference is here made to the prospectus or circular sent to these bondholders by Coffin and Stanton, when negotiations were being made concerning their sale or hypothecation, as shown by the depositions of most of the bondholders (Rec., pp. 91 to 146. See circular, Rec., p. 97). Such circular states, in terms, the amount of the assessed valuation of the taxable real and personal property in the city of Santa Cruz, the amount of the outstanding indebtedness, and the total amount of the refunding bond issue, namely: assessed value, $3,907,400; out-

standing water bonds, $320,000; refunding bond issue $360,000; making the total indebtedness showed $680,000.

The charter of the city of Santa Cruz (Sec. 40, Stats. Cal., 1875-6, p. 204) requires that there shall be entered on the public records of the city annual statements specifying, among other things, all evidences of indebtedness issued, and the portion thereof remaining outstanding.

In the late case of Sutliff *vs.* Lake County Commissioners, 147 U. S., 230, in which certain municipal bonds were held invalid, notwithstanding their recitals, the Supreme Court of the United States held that where the constitution and a statute of a State forbid any county to issue bonds to such an amount as will make its aggregate indebtedness exceed a certain proportion of the assessed valuation of taxable property in the county, and a statute requires the county commissioners to publish and to enter on the public records of the county semi-annually statements showing the whole amount of the county debt, a purchaser for value and before maturity of a bond issued in excess of the constitutional and statutory limit, is charged with the duty of examining the record of indebtedness, and the county is not estopped by a recital in the bond that all the provisions of the statute have been complied with, to prove by the record of the assessment and the indebtedness that the bonds were issued in violation of the constitution.

In this case, Mr. Justice Gray said: "In those cases "in which this court has held the municipal corpora- "tion to be estopped by recitals in its bonds, to assert "that they were issued in excess of the limit imposed "by the constitution or statutes of the State, the "statutes, as construed by the court, left it to the offi- "cers issuing the bonds to determine whether the facts "existed which constituted the statutory or constitu- "tional condition precedent, and did not require those "facts to be made a matter of public record. * * * "But if the statute expressly requires those facts to be "made a matter of public record, open to the inspection "of every one, there can be no implication that it was "intended to leave that matter to be determined and "concluded contrary to the fact so recorded by the offi- "cers charged with the duty of issuing the bonds."

The Lake County case cannot be distinguished in principle from the case at bar, and we respectfully ask its careful consideration, as we deem it conclusive of the question, as the findings conclusively show that the so-called refunding bond issue, added to the previously existing bonded indebtedness of the city of Santa Cruz, exceeded the legal limit of 15 per cent. upon the assessed value of all taxable real and personal property in the city, it follows that judgment against defendant must be reversed, because while only a portion of the refunding bond issue was in excess of the legal limit, there has been no segregation of the refunding bonds

by which or from which the court can ascertain what bonds were within the legal limit, and what bonds of the refunding issue were issued after the limit had been reached. Not only has there been no such segregation or showing, but there can be no such segregation or showing. A part of the single issue of bonds being invalid, the entire issue must be held invalid.

Aetna Life Ins. Co. *vs.* Lyon Co., 44 Fed Rep., 229.

Hedge *vs.* Jackson Co., 150 U. S., 182.

In Aetna Life Insurance Company *vs.* Lyon County, 44 Fed. Rep., 229, the court tersely states the rule as follows:

"When a portion of issue is valid and portion invalid, " judgment must be for the defendant."

In Hedges *vs.* Jackson County, supra, the United States Supreme Court held that holders of municipal bonds, issued by a county, in excess of its authority, cannot, by an offer to surrender and cancel so much of such bonds as may, upon inquiry, be found to exceed the limit authorized by law, invest a court of equity with jurisdiction to ascertain the amount of such excess, and to declare the residue of such bonds valid and enforce the payment thereof against the county.

The decision of the United States Supreme Court in the recent case of Board of Commissioners *vs.* Rollins,

19 S. C. R. No. 19, p. 390, does not conflict with our contention in this behalf. In that case, there was an express recital in terms, in the bonds, that they were within the statutory limit, and there was no public record from which purchasers could ascertain the amount of outstanding indebtedness, and the case seems to have turned on those points. In this case, there is no such recital, and the public record does, and did, show the amount of outstanding indebtedness.

VI.

THE BONDS AND COUPONS IN QUESTION WERE NOT SIGNED BY THE MAYOR OF THE CITY OF SANTA CRUZ, AND WERE, THEREFORE, NOT OBLIGATIONS OF THE CITY OF SANTA CRUZ *(Finding No. 9, Rec., p. 22; Finding No. 13, Rec., p. 24).*

Assignments of Error 47, 48, 49 and 50, Rec., pp. 290 to 296. Specifications, Supra pp 93 to 106.

The court found that on April 11, 1892, Wm. T. Jeter was duly elected mayor of the city of Santa Cruz, and, within ten days thereafter qualified and entered upon the duties of his office, and that thereafter on April 9th, 1894, Robert Effey was duly elected mayor, and, on April 16th following (the day of the date of the bonds), between 11 o'clock a. m. and 2 o'clock p. m., duly qualified as such (Rec., pp. 22-3), and further finds that some of the bonds in question "were signed by Wm. T.

"Jeter on April 16, 1894, after the qualification of his "successor in the office of mayor" (Rec., p. 24, Finding 13), and it further appears from the opinion of the court below, if it may be referred to for the purpose, that it is impossible to determine which of the bonds were signed before and which were signed after the qualification of Mr. Jeter's successor in office as mayor (Rec., p. 49).

We contend that Mr. Jeter had no authority to sign the bonds after the election and qualification of his successor; that the bonds signed after that time are void, and that, as it is impossible to segregate such bonds from the remainder of the issue, all must be held to be void.

His signature to certain of the bonds after the expiration of his term was the act of a private citizen, and not of a public officer authorized by law to execute negotiable instruments of the municipality, and the bonds, under a familiar rule, are void even in the hands of purchasers for value.

Coler *vs.* Clefurne, 131 U. S., 162.

Ordinance No. 320, which had the force of a statute, provided that the refunding bonds should be signed by the mayor (Finding 8, Rec., p. 20).

The charter of the city of Santa Cruz provides as follows (section 3 of an act to reincorporate the city of Santa Cruz, approved March 11, 1876, Stats. Cal. 1875-6, p. 189): "On the second Monday in April, A. D. one

"thousand eight hundred and seventy-six, and bienni-
"ally thereafter on the second Monday of April, a
"charter election shall be held at which the legally
"qualified voters of said city shall elect the several re-
"spective officers, as hereinafter provided, viz: A
"mayor and four councilmen—one from each ward,
"who shall be electors of the wards from which they
"are chosen; which mayor and councilmen shall hold
"their office for two years and until their successors
"are duly elected and qualified."

This is the only section of the charter providing for the commencement and ending of the terms of office of the mayor and common councilmen of the city, and there can be no question that under its plain terms the mayor-elect became mayor *de jure* on his qualification after the charter election, and that at such qualification the retiring mayor at once and instantly ceased to be an officer of the city of Santa Cruz. The statute will permit of no other construction.

Official terms should not be extended beyond time clearly defined, but rather shortened by implication, if necessary.

People ex rel. Harris *vs.* Branham, 3 Cal., 477.

The court below as a conclusion of law declares that at the time of the signing of the bonds on the afternoon of April 16, 1894, William T. Jeter was *de facto* mayor of the city of Santa Cruz (Rec., p. 25). This conclusion

of law is not supported by the findings nor by the evidence, and we contend that at the time of the signing of the bonds, William T. Jeter was neither *de facto* nor *de jure* mayor of said city, but a mere intruder and usurper, having no authority or power to bind the city in any manner whatever. It does not appear from the findings that Mr. Jeter signed the bonds in the council chamber of the city of Santa Cruz, nor in any public place where his acts might be observed by any of the officers or inhabitants of the city, but in the seclusion of his private office in the bank of Santa Cruz county, of which institution he was at the time president. It was no public exercise of any duty devolving upon the mayor of the city of Santa Cruz, but, as before said, was done privately and without the notice or knowledge of any person whomsoever (Rec., pp. 149-50). At the time he was not clothed with the insigna of office, nor was he acting in such a manner as to give notice to the public generally, nor to any part of the public, that he was acting, or pretending to act, as mayor of the city of Santa Cruz.

We contend that upon the qualification of his successor, Mr. Jeter's term of office ceased, and he thereafter was not mayor *de jure* of the city of Santa Cruz.

Jeter not Mayor de facto.

The only question remaining to be considered is, whether his act in signing the bonds on the afternoon

of the 16th of April, 1894, was the act of an officer *de facto*.

The court, as a conclusion of law (Rec., p. 25), finds that at the time of signing the bonds in question Mr. Jeter was *de facto* mayor.

Perhaps the leading case in the United States on the subject of *de facto* officers is that of the State *vs.* Anthony Carroll, 38 Conn., 449. The opinion given in that case is very exhaustive and refers to all prior decisions, both ancient and modern, bearing upon the subject. It has been cited as authority by almost every court having occasion to consider this question since the opinion of Mr. Chief Justice Butler was written, and it may be safely deemed to be the settled law upon the question in so far as its application to the facts of any individual case. Mr. Chief Justice Butler, in reviewing the decisions rendered by the courts, both of England and the United States, from the earliest time down to the present, says as follows:

"A definition sufficiently accurate and comprehen-
"sive to cover the whole ground must, I think, be sub-
"stantially as follows: An officer *de facto* is one whose
"acts, though not those of a public officer, the law upon
"principles of policy and justice will hold valid so far
"as they involve the interests of the public and third
"persons where the duties of the office were exercised.

"First. Without a known appointment or election,
"but under such circumstances of reputation, or ac-
"quiescence as were calculated to induce people, with-

"out inquiring, to submit to or invoke his action, sup-
"posing him to be the officer he assumed to be.

"Second. Under color of a known and valid ap-
"pointment or election, but where the officer had failed
"to conform to some precedent requirement or condi-
"tion, as to take oath and give a bond or the like.

"Third. Under color of a known election or appoint-
"ment, void because the officer was not eligible, or be-
"cause there was a want of power in the electing or ap-
"pointing body, or by reason of some defect or irregu-
"larity in its exercise, such ineligibility, want of power
"or defect being unknown to the public.

"Fourth. Under color of an election or appointment
"by or pursuant to a public unconstitutional law, be-
"fore the same is adjudged to be such.

"Anything less comprehensive and discriminating
"would, I think, be imperfect and deceptive as a defini-
"tion."

This definition has been quoted approvingly by many of the courts of the land, and the opinion in which it appears has always been most highly commended as being, not only very learned and exhaustive, and remarkable for its research and reason, but as well one which will stand as a landmark of the law upon the subject.

5 Am. & Eng. Enc. of Law, 96.

Under which, if any, of these classes does Mr. Jeter fall?

It is evident that he does not come within the second, third or fourth classes referred to in the definition, and there only remains to be considered whether or not he falls within the first class.

We claim that the opinion of Mr. Chief Justice Butler, which must be regarded as law, absolutely sustains our position that Mr. Jeter, at the time of the signing of the bond on the afternoon of April 16, 1894, was not mayor *de facto* of the city of Santa Cruz.

Mr. Chief Justice Butler, in considering this question, had occasion to refer to the case of Brown *vs.* Lunt, reported in 37 Maine, 322, and he did so in the following language: "A similar case arose in Maine in "1854, Brown *vs.* Lunt, 37 Me., 322. A justice of the "peace, an annual officer, without legal right to hold "over, who had been justice of the peace for many "years in succession, was not re-appointed, but contin- "ued to act, and took the acknowledgment of an im- "portant deed. The question was raised whether the "act was valid and the deed good. The deed was exe- "cuted about two years after his term of office expired, "and the court held the acknowledgment good. In an "elaborate and learned opinion, they say that an officer "*de facto* is one who has the reputation of being an officer "(citing from Parker *vs.* Kett, and Rix *vs.* Level), or one "who actually performs the duties of an office with ap- "parent right and under claim and color of an appoint-

"ment or election, or one who exercises the duties of "an office with at least a fair color of right or an ac- "quiescence by the public in his official acts so long "that he may be presumed to act as an officer by right "of an appointment or an election. The case was sus- "tained on all these grounds. It was a case where "there was sufficient reputation and sufficient grounds "for presumption, but in my judgment *not a case of* "*color*. It seems to me absurd to say that color from "election or appointment can extend beyond the dis- "tinct and independent term for which the officer was "elected or appointed—beyond the term when the "election or appointment could be operative if legal."

With like reason it must be held that upon the expiration of Mr. Jeter's term of office, that is to say, at the time of the qualification of his successor at noon on April 16, 1894, his color of right to the office ceased to exist, and thereafter, if he continued either privately or otherwise to discharge his duties, or to attempt to discharge the duties of the office, his acts were illegal and void, as those of a usurper and intruder, unless, indeed, he continued so to exercise and discharge in a public manner the duties of the office until he had acquired, by reputation and general acquiescence, the status of a *de facto* officer.

To hold that such reputation could be acquired in the space of three hours, during which time the person alleged to be an officer *de facto*, was confined within

the walls of his own private office, attending to his private duties, and not discharging, or attempting to discharge, any of the responsibilities devolving upon the chief executive of the municipality, would, it seems to us, be manifestly absurd. Reputation cannot be acquired in that manner, nor in such limited time, and the public had no opportunity to acquiesce, for the public did not know that Mr. Jeter pretended to act as mayor of the city, or that he was performing any duty which by right should devolve upon the mayor of the city of Santa Cruz.

There was, therefore, no reputation, no acquiescence by the public; there was simply the unauthorized act of a citizen who had been mayor of the city, but who, by the votes of the people, by the election of his successor, and his qualification, had been retired to the walks of private life.

It must in this connection be remembered that the signing of the bonds by Mr. Jeter was done privately, not publicly, and therefore such cases as may be cited by counsel for plaintiff, where it has been held that the act of an officer performed publicly after the term of his office had expired, was the act of an officer *de facto*, are not to the point.

In Connelly *vs.* Ashworth, 98 Cal., 205, the case was tried by the court without a jury, and its decision given in writing, and signed by the judge, but not filed with the clerk until after the term of office of the judge had expired, it was held by the Supreme Court of the State

of California that, when the term of office of the judge who tried the case expired before such decision was filed, the fact that it was signed by him, and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment thereon.

And again, the Supreme Court of the State of California has said that upon the expiration of the term of office of a judge, his judicial power ceases, and it is not competent for him thereafter to do any act necessary to complete the trial of any cause which remains unfinished at the expiration of his term.

Broder *vs.* Conklin, 98 Cal., 360.

The rule universally followed by the courts of California has been that upon the expiration of the term of office of any officer, his power as such officer ceases, and any act performed by him thereafter as such officer is a nullity and has no force or effect, unless indeed he holds over under some color of right.

"One who has held the office of supervisor is, after the "expiration of his term and the election and qualifica- "tion of his successor, no longer an officer, either *de jure* "or *de facto*, but if he attempts to act as such, is a mere "naked usurper."

Trinity Co. *vs.* McCamnom, 25 Cal., 117.

"Upon the expiration of the officer's term, unless he is

"authorized by law to hold over, his rights, duties and "authorities as a public officer must *ipso facto* cease."

Mechem on Public Officers, Sec. 396.
Badger *vs.* United States, 93 U. S., 599.
People *vs.* Tieman, 8 Abb. Pr. (N. Y.), 359.
Vogel *vs.* State, 5 West Rep., 546.
Eilison *vs.* Alme, 9 West Rep., 730.

One who holds over after his term of office expires is an intruder, and he does not become an officer *de facto* until he has held for such a length of time that reputation and general acquiescence have established color of right.

"The existing appearance of right which may mislead, "is the essential ground of the doctrine, for otherwise "there is no excuse for the party deceived and on basis "for a demand of protection. There must be either some "appointment or election which might be supposed to be "valid, and possibly such an occupation of the office "without dispute and with general acquiescence as "would reasonably lead to the inference that such au- "thority existed, although not at the time known."

Williams *vs.* Boynton, 147 N. Y., 432.
Corey *vs.* Curtis, 9 Nev., 325.

It has been held that, "Justices who exercise the func- "tions of their office after the expiration of their term,

" and after their legal successors have duly qualified, are " not even officers *de facto,* but mere usurpers, without " even the color of office."

Becker *vs.* People, *ex rel.* Wilson, 156 Ill., 301.

In the case last cited, the supreme court of Illinois said: "On the first Monday in May, 1893, the defend- " ants' title to their office expired by lapse of time, and " from that time they were not even officers *de facto,* but " were mere usurpers, without even the color of office. " The judgment of the court finding them guilty and " ousting them from the office which they were thus " usurping, was therefore clearly right."

Acts of *de facto* officers who exercise their office for a considerable length of time are as effectual when they concern the rights of third persons or the public as if they were officers *de jure,* but to constitute one an officer *de facto* there must be an actual exercise of the office, and acquiescence of the public to cause in the mind of the citizen a strong presumption that the officer was duly elected.

Hughes *vs.* Long, 119 N. C., 52.
Gilliam *vs.* Reddick, 4 Ired., 368.
Burke *vs.* Elliott, 4 Ired., 355.
State *vs.* Lewis, 107 N. C., 967.

Effey was de facto, as well as de jure, mayor.

At the time of his qualification, between 11 o'clock a. m. and 2 o'clock p. m. of April 16, 1894, Robert Effey became mayor of the city of Santa Cruz, and was actually inducted into and in the possession of the office, for the filing of his oath of office was an assumption of its functions, and he was therefore *de facto* as well as *de jure* mayor. To be sure, he did not publicly perform any of the duties of mayor of said city until the time of the next regular meeting of the council as fixed by the statute (Stats. 1875-6, Sec. 7, p. 192), on the first Monday in May, 1894, but this does not controvert the proposition that after his qualification he was actually and lawfully mayor of the city of Santa Cruz. If there had been any duty for him to perform as mayor of such city after his qualification and before the next regular meeting of the council, it must be presumed that, as such mayor, he would have performed such duty. As the legal mayor of the city of Santa Cruz, he certainly had nothing to do with the actions of an illegal mayor, nor with presiding over meetings of an illegal council, pretending to transact business for and in the name of the city of Santa Cruz at pretended special meetings called by themselves, and not provided for by any statute or ordinance, between the 16th day of April, 1894, and the first regular meeting of the common council in the month of May. It does not appear that any notice was given of any such special meetings, nor that the mayor-elect, or

the public, had any notice or knowledge of any of such meetings.

It is a well settled rule that there can be no officer *de facto* where there is an officer *de jure* in possession of the office, and we have shown that Mr. Effey by filing his oath, the only induction into the office recognized by law, assumed the functions and took possession of the office.

5 Am. & Eng. Enc. of Law, 105.
Boardman *vs.* Holliday, 10 Paige, 223, 232.
School District *vs.* Smith, 67 Vt., 568.
People *vs.* Callaghan, 83 Ill., 135.
State *vs.* Callaghan, 61 N. W., 1025.

VII.

THE BONDS AND COUPONS IN QUESTION WERE VOID, IN THAT THEY WERE ISSUED IN VIOLATION OF AND CONTRARY TO THE TERMS OF SECTION 18 OF ARTICLE XI OF THE CONSTITUTION OF CALIFORNIA IN THIS, THAT THE POLLS AT THE ALLEGED ELECTION ON THE QUESTION OF REFUNDING WERE CLOSED ONE HOUR AND FIFTEEN MINUTES BEFORE THE TIME PRESCRIBED BY LAW FOR CLOSING THE SAME, AND BEFORE ONE-HALF OF THE QUALIFIED ELECTORS OF SAID CITY OF SANTA CRUZ HAD VOTED AT SAID ELECTION *(Findings Nos. 6 and 7, Rec., pp. 19-20; Additional Findings No. 2, Rec., pp. 32 to 39; Error No. 49, Rec., pp. 292-3, 295; Error No. 51, Rec., p. 297; Error No. 53, Rec., p. 299; Error No. 61, Rec., p. 301-2).* Specifications, Supra pp 96, 108, 113, 119.

The Constitution of California, Article XI, Section 18, provides that no city "shall incur any indebtedness or "liability, in any manner or for any purpose exceeding "in any year the income and revenue provided for it for "such year, without the assent of two-thirds of the qual- "ified electors thereof, voting at an election to be held "for that purpose. * * * Any indebtedness or liabil- "ity incurred contrary to this provision shall be VOID."

The refunding act of 1893 requires that the question of refunding the outstanding indebtedness of any city availing itself of the provisions of the act shall be submitted to the qualified electors of the city at an election to be held for that purpose; and provides further as follows:

"Said election shall be called and held in the same "manner in which other elections are held in such city "or town. The notice of such election shall recite the "indebtedness to be refunded, together with the denom- "ination, character, time of payment, rate of interest, "as well as all other details of the bonds proposed to be "issued."

The provision for calling city elections is contained in Section 5 of the charter of Santa Cruz (Stats. 1875-6, p. 191; supra, p. 301, and is as follows:

"It shall be the duty of the mayor and common coun- "cil to call all city elections, to designate the time and "place of holding the same—giving at least ten days'

"notice thereof * * * and all provisions of law regu-
"lating elections for State and county officers shall ap-
"ply, as far as practicable, to elections under this char-
"ter. The polls for all elections shall be opened at 9
"o'clock a. m., and shall not be closed until sundown of
"the same day."

It is not claimed that these requirements of the Constitution and statutes of the State were even in substance complied with in the calling and holding of the alleged election upon the question of refunding the outstanding indebtedness of the city of Santa Cruz, and issuing the bonds in question therefor.

The charter of the city expressly provided that "the "polls for all elections shall be open at nine o'clock "a. m., and shall not be closed until sundown of the "same day" (Stats. 1875-6, Sec. 5, p. 191).

But Ordinances Nos. 314-315 provided, with reference to the special election on the question of refunding the indebtedness of the city of Santa Cruz, and issuing bonds therefor, "The polls for such election shall be opened at "sunrise on the morning of the day of election, and shall "close at 5 o'clock p. m. of the same day"—a direct violation of the law; and, as found by the court, "at said "election held on March 13th, 1894, the polls were open-"ed and closed at the hours named in said ordinance" (Original Finding No. 6, pp. 19-20), and in its additional findings of fact, the court, amplifying this finding, says:

"Said ordinance further provided that the notice so "to be published and posted should be substantially in "the words and figures set out in said ordinance, and "should contain, among other things, a recital of the "indebtedness to be refunded, as set forth in the ordi- "nance referred to in Finding No. 5, together with the "denomination, character, time of payment, rate of in- "terest, as well as all other details of the bonds pro- "posed to be issued, and all of which matters were "fully set forth and stated in the Ordinance No. 315 of "said defendant, together with notice that the polls of "such election should be opened at sunrise in the morn- "ing of said day of election, and should close at five "o'clock P. M. of the said day, the said time fixed for "closing the polls being one hour and fifteen minutes "before sunset, and at the said election held on March "13th, 1894, the polls were opened and closed at the "hours named in said ordinance" (Additional Finding No. 2, Tr. of Rec., p. 33).

The court further finds that "less than one-half of "the qualified electors of said defendant voted at said "election" (Additional Finding No. 2, Tr. of Rec., p. 33).

These findings are sustained by the evidence, but as they are unchallenged and therefore conclusive, a reference to the testimony supporting them is unnecessary.

It therefore appears from the findings of fact in the case that no notice of election on the question of re-

funding the bonded indebtedness of the city of Santa Cruz and issuing bonds therefor was ever given as required by the refunding act (Stats 1893, p. 59) and by the charter (Stats. 1875-76, p. 191, Sec. 5), or as provided in Ordinance No. 315, which, being adopted pursuant to the law, and conforming to the laws of the State, had the effect of a statute in determining what notice of election should be given. As we have already shown, the publication of the ordinance, as found by the court, was not a notice of election, although it embodied the form of the notice which the ordinance required to be given, at least in substance, by the city clerk, but so far from advising the people to attend and vote at the special election, the effect of the publication of the ordinance was rather to mislead them, because any elector reading the ordinance, and seeing that it provided for a notice of election to be given by the clerk, might well suppose that unless such notice of election should be given as directed in the ordinance, that there would be no election, notwithstanding the passage of the ordinance.

Again, it appears from the findings of fact made by the court, that before one-half of the qualified electors of the city of Santa Cruz had voted at the so-called special election, the polls were unlawfully closed throughout the city of Santa Cruz one hour and fifteen minutes before the time prescribed by law for the closing of the polls at such election. The refunding act on this point provides that the election on the question

of refunding "shall be called and held in the same man-
"ner in which other elections are held in such city or
"town" (Stats. 1893, p. 59, Sec. 1). The charter of the city provides, "It shall be the duty of the mayor and
"common council to call all city elections, and desig-
"nate the time and place of holding the same—giving
"at least ten days' notice thereof" (Stats. 1875-76, p. 191, Sec. 5). The ordinance providing for notice of the so-called special election upon the question of refunding and issuing the bonds in controversy contained the following provision: "The city clerk is hereby di-
"rected and authorized to cause to be publised in the
"'Santa Cruz Surf' and 'Santa Cruz Daily Sentinel,'
"newspapers printed and published in said city of
"Santa Cruz, in the county of Santa Cruz, for not less
"than ten days before the 13th day of March, 1894, a
"notice of said special election, and to cause to be
"posted at each place of election hereinafter men-
"tioned in said city, a notice of said special election,
"which said notice, so to be posted, shall be substan-
"tially in the words and figures, viz:" (setting forth form of notice of election).

(Additional Finding No. 2, Rec., p. 34.)

Yet the Constitution of California requires as a condition precedent to the contraction of such indebted-
ness by any city "the assent of two-thirds of the quali-
"fied electors thereof voting at an election to be held

" for that purpose" (Constitution of California, Art. XI, Sec. 18); and further in the same section, provides that " any indebtedness or liability incurred contrary to " this provision shall be void." The court will observe that the constitution expressly provides, as above quoted, that the effect of the failing to observe the requirements of Section 18 of Article XI thereof is to render the indebtedness or liability *void*—not invalid if attacked by any person interested, nor voidable at the option of any person or party, but *void*. This constitutional provision is very unusual, and absolutely removes all question and all discretion concerning the matter. Whatever may be the rule of law in other States, applying to bonds issued under like circumstances, but under different constitutional provisions, bonds of a California municipality that are invalid because of a failure to comply with the constituional provisions relating to "the assent of two-thirds of the " qualified electors" of the city issuing the same, "voting at an election to be held for that purpose * * * " shall be void."

The judgment in the case proceeds upon the theory that the bonds, when issued, were invalid. The court below holds them to have been invalid, and expressly adjudges that holders of the bonds ("Northern Counties Investment Company, Limited," Rec., pp. 18-19, 25), having notice of the conditions under which they were issued, are not entitled to recover as against the city of Santa Cruz, but holds that in the absence of knowl-

edge or notice sufficient to put them upon inquiry, innocent purchasers of the bonds are protected by estoppel against the assertion of the facts constituting the invalidity of the bonds; but manifestly no estoppel, by recital or otherwise—no matter how arising—can vivify or give vitality or validity to bonds that, at the time of their issuance, were void under the terms and provision of the constitution of the State.

That the election was invalid upon the facts found by the court concerning the failure to publish notice of the election, as required by the law and the ordinance, and because of the closing of the polls one hour and fifteen minutes before the time prescribed by law for closing them, and before one-half of the qualified electors of the city had voted at the election, seems to us to be unquestionable. But the authorities upon all of these propositions seem to be uniform, and to uphold the rule for which we contend.

Because the election upon the question of refunding the indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof, and issuing bonds therefor, and for all of the essential steps by which the holding and conduct of such election and the notice thereof were provided for, were jurisdictional, the sufficiency or the validity thereof were not matters committed by law to the adjudication of the mayor and common council of the city of Santa Cruz. The mayor and common council of the city of Santa Cruz were authorized by law to determine and certify the result of

the election held; that is to say, to determine the number of votes polled, the number of votes cast in favor of refunding the indebtedness to be refunded, the number of votes cast against the proposition, and whether or not a two-thirds majority of the electors voting at such election had voted in favor of refunding the indebtedness; but the mayor and common council were not authorized nor required to adjudicate or determine the fact that there was or was not an election held upon that question; that the notice of election, if any, was sufficient under the law; nor that the polls were kept open during the hours prescribed by law. Those matters were all jurisdictional; and a failure to comply with the law with respect to any of such matters was an absolutely incurable defect in the proceedings by which the mayor and common council sought to acquire jurisdiction to issue the bonds in question; and such failure, by the express terms of the Constitution of California, rendered the bonds issued upon the authority of such election void, and therefore incurable by any means whatever.

Those provisions of the law which fix the time or place for holding elections are to be construed as mandatory. The general rule is, that if the polls are not kept open for as many hours as the law directs, and if legal voters in numbers sufficient to change the result, or to render it doubtful, are thereby deprived of the privilege of voting, the election must be set aside.

McCrary on Elections (3rd Ed.), Sec. 240.

A considerable deviation from the hours fixed by law for keeping open the polls must render the election void.

Ibid., Sec. 127.

Pa. Dist. Election, 68 Pa. St., 33.

When the polls at an election precinct were not opened until nearly 10 o'clock, and an adjournment was made at noon, etc., the provisions of the law are substantially violated, and the vote of the precinct is void.

Jebbe *vs.* Smith, 108 Cal., 101.

It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it.

Ibid., p. 111.

Provisions as to the time and place of holding the election are mandatory.

Atkinson *vs.* Lorbur, 111 Cal., 424.

If the deviation from the legal hours is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it is not.

Sec. 130, McCrary on Elections.

When the order for an election for the issuance of bonds made by the electors of the district, and the notice of election, called for the opening and closing of the polls earlier and later than the time fixed by the statute, and persons were allowed to vote at the election after sunset, the effect of the departure from the statute renders the election nugatory.

Directors F. I. Dist. *vs.* Abila, 106 Cal., 365.

It will be noticed that the refunding act provides that the election shall be called and held in the same manner in which other elections are held in such city or town, and in this connection it has been held that those provisions of the statute which affect the time and place of holding the election are generally of the substance of the election.

McCrary on Elections, Sec. 193.

"If it appear that due notice has not been given, and "that a portion of the electors have been thereby de- "prived of their right to vote, and particularly if the "number thus deprived is sufficient to have changed "the result, if they had voted on one side or the other "—in such a case the election is clearly void."

McCreary on Elections (3rd Ed.), Sec. 144.

The election, therefore, being invalid and void for the reason that the polls were closed an hour and

fifteen minutes before the time prescribed by the charter, thus depriving more than one-half of said qualified electors of an opportunity of expressing their will with reference to the question of refunding the bonded indebtedness of the city, the question now arises: What effect has the void election on the validity of the bonds in controversy here?

It must be conceded that, as to all holders who purchased with notice of the illegality of such election, the bonds are void; but we contend that the void election renders the entire issue of the bonds void, no matter whether the holders thereof be bona fide purchasers for value or otherwise, and that this defect is not cured by any recital contained in the bond. It is true that the bonds themselves recite that they were issued "in pur-"suance of and in conformity with a vote of more than "two-thirds of all the qualified electors of said city of "Santa Cruz, voting at a special election duly and "legally called and held, and conducted in said city, as "provided under said act, on Tuesday, the 13th day of "March, 1894, notice thereof having been duly and "legally given and published in the manner as re-"quired by law, and after the result of such election "had been canvassed, found and declared in the man-"ner and as required by law."

It is undoubtedly the rule, well established, that the municipality is estopped by recitals contained in its bonds from asserting any irregularity in their issuance,

when such recitals are made by officers invested with the authority to determine the question, and when the facts recited do not go to the subject-matter of jurisdiction; but we contend that the doctrine of estoppel has no application here for three reasons:

First. The mayor and city clerk of the city of Santa Cruz are not officers invested by law with the authority to determine the validity or even the result of elections held in the city of Santa Cruz. But if it be held that the bonds are not executed by the mayor and clerk alone, but by the common council as well, because by the adoption of Ordinance No. 320 that body authorized their execution in its name, yet the mayor, common council and city clerk, collectively, have no power to make the recitals contained in the bonds. Such recitals are, therefore, *ultra vires* and void.

Bank of Commerce *vs.* Town of Granada, 10 U. S. App., 692.
Dixon Co. *vs.* Field, 111 U. S., 83, 94.
Sutliff *vs.* Lake Co. Com., 147 U. S., 230.

When a vote of the people is necessary to authorize the issuance of municipal bonds, it is the fact of the assent of the voters, and not the certificate of that fact, which is essential to the grant of authority.

Brown *vs.* Ingalls, 86 Fed. Rep., 261.

Second. Section 18 of Article XI of the constitu-

tion of California reads as follows: "Section 18. No "county, city, town, township, board of education, "or school district, shall incur any indebtedness "or liability in any manner, or for any pur- "pose, exceeding in any year the income and "revenue provided for it for such year, without "the assent of two-thirds of the qualified elec- "tors thereof voting at an election to be held for "that purpose, nor unless before or at the time of in- "curring such indebtedness provision shall be made "for the collection of an annual tax sufficient to pay "the interest on such indebtedness as it falls due, and "also provision to constitute a sinking fund for the "payment of the principal thereof on or before ma- "turity, which shall not exceed forty years from the "time of contracting the same. Any indebtedness or "liability incurred contrary to this provision shall be "void."

The State of California is one of a few States in the Union whose constitutions contain similar inhibitions. Our contention is that no recitals can estop the city from pleading and proving irregularities and informalities in an election held for the purpose of overcoming a constituional inhibition against the incurring of an indebtedness without the assent of a certain proportion of the qualified electors. In such a case, the holding of a valid election and the assent of a sufficient number of the qualified electors are jurisdictional, and

without them the municipality has no authority to proceed further; and any bond issued by the officers of the municipality thereafter is void, regardless of its recitals, for want of power to issue it.

Mr. Simonton, in his valuable work on municipal bonds, states the rule as follws: "When the constitu-
" tion requires that the question be submitted, if not
" done, and the bonds are issued, they are void, and
" there can be no estoppel."

Sec. 67, Simonton on Municipal Bonds.

As was said by Mr. Justice Field in Marsh *vs.* Fulton County, 10 Wall., 676: "It is a case where the power
" to contract never existed—where the instruments
" might, with equal authority, have been issued by any
" other citizen of the county. It was a case, too, where
" the holder was bound to look to the action of the offi-
" cers of the county, and ascertain whether the law
" had been so far followed by them as to justify the
" issue of the bonds. The authority to contract must
" exist before any protection as an innocent purchaser
" can be claimed by the holder. This is the law, even
" as respects commercial paper alleged to have been
" issued under delegated authority, and as stated in the
" case of Floyd Acceptances."

In March County *vs.* Cook, 38 Ill., 45, it appeared that the election was ordered by the county court, when it should have been ordered by the board of

supervisors. The vote was in the affirmative. The supervisors issued the bonds. It further appeared that for a number of years the county raised and paid the annual interest of $6,000 on the bonds, and also that the county voted yearly on the stock it received. The court held the bonds in suit void, because of a want of power, holding that, as the election was not called by the proper officers, there was, in fact, no election under the statute. That it was the duty of the purchaser to examine the record, and had he done so, he would have ascertained that the election had been called by the wrong body.

It will be noticed that the section of the constitution referred to declares emphatically that any indebtedness or liability incurred contrary to its provisions SHALL BE VOID. It is the well established doctrine that when the statute or provision of the constitution authorizing the issue of the bonds declares in express terms that unless the conditions precedent are performed, the bonds shall not be issued or shall not be binding obligations; such bonds, if issued, and the conditions necessary to be performed prior to their issue are not in fact performed, *are void*, in the hands of even a bona fide holder, notwithstanding any recitals.

"Bonds issued under such statutes are not valid and "binding because of the express provision of the stat- "ute, of which, of course, all persons are bound to take "notice; and until the conditions are performed, the

"municipality has not the power to issue the bonds,
"and if it should, without the performance of the con-
"ditions imposed by the statute, there is a want of
"power to issue, and as a want of power is a good de-
"fense against a bona fide holder, notwithstanding
"any recitals in the bonds, such bonds are void."

Simonton on Municipal Bonds, Sec. 253.

The same author further says: "We are of the opin-
"ion that when a vote is a necessary prior condition to
"the issuing of bonds or the incurring of a debt, that
"if no vote is taken, no election in fact held, that the
"municipal authorities have no power to make the
"issue or incur the debt, and that in such a case the
"corporation should not be estopped to set up the omis-
"sion as a defense. The acts of the corporation in issu-
"ing the bonds should be held to be *ultra vires*."

Ibid., Sec. 202.

This doctrine has been upheld by the courts of many States, and seems to be founded on principle and authority.

Stein *vs.* Franklin Co., 48 Mo., 167.
Carpenter *vs.* Lathrop, 51 Mo., 483.
Cagwin *vs.* Town of Hancock, 84 N. Y., 532.
Craig *vs.* Town of Andes, 93 N. Y., 405.
Ontario *vs.* Hill, 99 N. Y., 324.

In the case of Hedges *vs.* Dixon County, 150 U. S., 187, the Supreme Court said: "Recitals in bonds issued "under legislative authority may estop the municipal- "ity from disputing their authority as against a bona fide holder "for value, but when the municipal bonds are issued "in violation of a constitutional provision, no such es- "toppel can arise by reason of any recitals in the "bonds."

In the case of Quaker City *vs.* Nolan, 59 Fed. Rep., 660, in a suit brought on bonds which recited that they were issued pursuant to the enabling statutes, which were referred to by title and date of approval, but contained no other recital, the defense was that no sinking fund had been provided when the bonds were issued, as required by the Constitution of Texas, the court held the bonds to be void for this reason, and said, incidentally, that no recital would estop the municipality from pleading the non-performance of the constitutional provision.

It will be observed in this case the constitution made void all debts if the provision was not complied with—in that respect being identical with the provision of the Constitution of California above quoted.

The Constitution of Idaho, Art. VII, Sec. 3, provides that "no county shall incur any indebtedness or liabil- "ity in any manner or for any purpose exceeding in "that year the income and revenue provided for it for "said year, without the assent of two-thirds of the

"qualified electors thereof voting at an election to be "held for that purpose."

In the case of Bannock County *vs.* Bunting & Co., 37 Pac. Rep., 277, the Supreme Court of Idaho decided that, without such a vote, the county could not issue bonds, the amount of which exceeded such income, though the purpose of the issue of the bonds was to pay existing indebtedness.

Third. In that portion of our brief which bears on the question of the want of power of the city of Santa Cruz to issue bonds for the purpose of refunding the mortgage bonds of a private corporation, we had occasion to mention the rule of law that recitals cannot be relied upon as an estoppel where the facts recited are matters of public record, and are open to the inspection of every one who is disposed to make inquiry, and we there cited, as authorities, Sutliff *vs.* Lake County Commissioners, 144 U. S., 230; Northern Bank of Toledo *vs.* Porter Township Trustees, 110 U. S., 608, and other cases. We respectfully insist that the same rule of law has application here, in that the statute of 1893, under which the refunding bonds were issued, or attempted to be issued, provides that the common council shall give notice of the election called for the purpose of determining the question of refunding such indebtedness, and that such notice shall recite the indebtedness to be refunded, etc. This notice became a matter of record to which all persons were referred,

and it would have been an easy matter for any intending purchaser of bonds to have ascertained, by examination of this record, that the election so called must have been illegal and void, in that the notice provided for by the said common council declared in express terms that the polls should be closed at 5 o'clock P. M., which was an hour and fifteen minutes before the legal time of closing the polls.

People *vs.* H. W. Seale, 52 Cal., 71.

VIII.

THE BONDS AND COUPONS IN QUESTION WERE NOT DELIVERED TO PLAINTIFF, NOR TO ANY OF HIS ASSIGNORS, BY THE OFFICERS OF THE CITY OF SANTA CRUZ *(Findings 8, 9, 10, 11, Rec., pp. 20 to 23; Error No. 52, Rec., p. 298; Error No. 56, p. 300).* Specifications, Supra pp. 109, 116.

In the execution of negotiable instruments, something more is necessary than their mere signing by proper officials or persons; there must be delivery.

Germania Savings Bank *vs.* Village of Suspension Bridge, 73 Hun., 590.

In the case just cited, Mr. Justice Dykman, in delivering the opinion of the Court, said: "It may be stated as "a general proposition of law that delivery is essential "to the validity of all written instruments. Promissory "notes, bills of exchange, and bonds, are all included in

"that general rule of law. The mere act of signing a "note or bond, and retaining it in the hands of the "maker, forms no contract. Before the instrument can "be operative, there must be a delivery as an evidence "of a subsisting debt, and until such delivery the paper "has no legal inception, and is inoperative. The fore- "going principle applied to this case seems to be decisive "of the appeal. These bonds never had a valid incep- "tion. They were stolen before delivery, and so were "destitute of that essential element of validity; they "were neither property nor the subject of ownership."

In Mercer County *vs.* Providence Life Ins. & Trust Co., 43 U. S. App., 21, certain county bonds were held void because issued without authority of law, the law requiring that they should be issued only when a certain railroad had been built through the county. The bonds were executed by the county authorities, and placed in escrow with a selected trustee, whose duty it was to deliver the bonds to the railroad corporation when the railroad had been built through the county. The railroad was built into the county, and to within two miles of the opposite boundary, and there connected with another line. Thereupon, the trustee delivered the bonds to the railroad company, and, in the course of time, they were placed upon the market, and went into the hands of innocent purchasers for value who had no notice of the non-performance of the condition precedent. In an elaborate and carefully prepared opinion, the court held that the

bonds were void, and that recitals cannot possibly operate as to a fact occurring after the execution of the bonds and before delivery, and that delivery is just as essential to the existence of a bond as it is to a deed.

To the same effect is the case of Citizens Saving & Loan Association *vs.* Perry Co., 156 U. S., 692. In that case the qualified voters of Perry county, Illinois, voted to subscribe to the capital stock of the Belleville & Southern Illinois Railroad, and to issue its bonds in payment thereof, conditioned that "no bonds should be issued or "stock subscribed until the railroad company should "locate their machine shops at Duquoin." In December, 1870, the county court directed the bonds to be issued, and they were issued, duly executed and delivered to the company, and by it put into circulation. But the shops were never located at Duquoin. It was held that the county court, by its order to issue the bonds, and the county officers, by issuing them, violated their duty as prescribed by the statutes; and as the bonds contained no recital precluding inquiry as to the performance of the condition upon which the people voted in favor of their issue, it was open to the county to show that it had not been performed, which, being shown, the bonds became subject to the provisions of the constitution, and were invalid.

It has been held that municipal bonds duly executed by the proper officers of a municipality, may be valid in the hands of innocent purchasers for value before apparent maturity, even though the bonds were stolen

from the municipal treasury, and never either sold or otherwise issued or delivered by the municipal authorities. But it will be found that in such cases the city has had full power and authority, without any legal limitation, restriction, or condition whatever, to issue negotiable bonds. Where such ample, unrestricted power exists, the equitable principle that where one of two innocent parties must suffer through the wrongful act of another, the burden must be borne by the party through whose act or negligence the wrong-doer was enabled to perpetrate the fraud. But the rule of the authorities mentioned has no application to municipal bonds which are required by law to be issued by the municipality in a particular way or upon particular conditions, or subject to limitations such as are imposed by the laws of California, and particularly by the act of March 1, 1893 (Stats. 1893, p. 59), namely, that they must be sold in the manner prescribed by the common council, and must be sold to the highest bidder, and must be sold for not less than their face value in United States gold coin, and that the selling price must be paid into the treasury of the city.

The findings of fact in this case show that none of these conditions were complied with in the alleged sale and delivery of the bonds in question, and that their pretended delivery was procured by the fraud of Walter Stanton, and that the persons making the delivery were not officers of the city of Santa Cruz (Rec., pp. 20-1, 22-24).

If the law imposes no limitation upon the right of a municipal corporation to issue bonds, the purchaser has nothing to inquire about save and except that the signatures to the bonds are genuine, that the persons signing were the officers of the city as represented, that the officer signing the bonds had power under the law to determine the questions of law and fact recited in the bonds as having occurred and having been complied with; but where limitations upon the right of the city to issue bonds, and upon the right and power of the officers to sell and to deliver the bonds, are imposed by statute, the bonds can have no validity unless the conditions and limitations imposed by law have been fulfilled and complied with, and the statute places all purchasers of such bonds upon inquiry as to the performance of such conditions and the observance of such limitations.

IX.

THE CIRCUIT COURT ERRED, TO THE PREJUDICE OF DEFENDANT, IN REFUSING, WHEN REQUESTED BY DEFENDANT, TO MAKE CERTAIN ADDITIONAL FINDINGS OF FACT, HEREINAFTER, IN THE DISCUSSION OF THIS POINT, SPECIFIED.

1.

That the circuit court erred in failing to make the additional finding set forth in Specification of Error No. IV (supra, p. 52) sufficiently appears from the testimony referred to in that specification.

The fraudulent procurement and appropriation of the bonds in question were duly pleaded as a substantial portion of the defense of the plaintiff in error in the court below (See answer of defendant, Rec., p. 17, par. II). It was denied by operation of law under the laws of California relating to pleading and procedure in actions at law, and the evidence not only supports the finding requested, but the finding requested is supported by all the evidence, and there is no evidence to the contrary. The evidence upon this subject is that Walter Stanton procured said bonds and coupons, and all of them, from the city clerk of the city of Santa Cruz (Rec., pp. 148-9), contrary to law, without the payment of any consideration therefor, and upon an illegal and unauthorized contract (Set forth on pp. 65-6 of the Record). That said Walter Stanton immediately after obtaining the bonds and coupons in question, viz: on the 24th day of April, 1894, left the city of San Cruz with the entire refunding bond issue in his possession (Rec., pp. 149, 204). That thereafter, in June, 1894, said Stanton was at the Occidental Hotel, in San Francisco, California, and there requested Robert Effey, the then mayor of the city of Santa Cruz, to bring the original contract under which the said Walter Stanton procured the said refunding bonds, including the bonds and coupons in question, to San Francisco, to be shown to him, Walter Stanton. That said Stanton had the document in his possession for a few hours, "may be over night." That Stanton finally returned the document to said

Effey, who returned it to the files in the office of the city clerk of the city of Santa Cruz (Rec., p. 204). That when said contract was next examined, it was discovered that the same had been forged and counterfeited by the extraction of one of the pages therefrom and the substitution of another page in its stead (Rec., pp. 193-4, 203-4, 205, 206-7). That the change made in said contract was a material change in the interest of the firm of Coffin & Stanton, and against the interest of the city of Santa Cruz, and in legal effect changed the contract from one of agency on the part of Coffin & Stanton for the sale of the refunding bonds for account of the city of Santa Cruz and the application of the proceeds to certain specified purposes, to an absolute sale of the bonds to said Coffin & Stanton by the city of Santa Cruz (See original instrument and forgery thereof, Rec., 193-4 and 206-7). All of the evidence in the case upon the subject indicates that said contract was mutilated and changed by said Walter Stanton during the time that he had it in his possesison in San Francisco, in June, 1894.

The findings show that Stanton received the bonds in question on April 24, 1894 (Finding No. 11, p. 23). The People's Trust Company purchased one of the bonds September 1, 1894 (Rec., p. 91). The International Trust Company of Boston received twelve of the bonds as collateral security for a $50,000 note of the firm of Coffin & Stanton, June 20, 1894 (Rec., p. 176). The Chapman National Bank received seven of the bonds as

collateral security for a note of that firm, May 8, 1894 (Rec., p. 94). The Wakefield Trust Company received one of said bonds as collateral security for a note of Coffin & Stanton in July, 1894 (Rec., p. 95). The National Bank of the Republic, Boston, Mass., received ten of the bonds as collateral security for a note of Coffin & Stanton June 7, 1894 (Rec., p. 98). E. G. & E. Wallace purchased 150 of the bonds from Coffin & Stanton in September, 1894 (Rec., pp. 99 to 102), the proceeds of which, as of all the other bonds sold, were appropriated by Coffin & Stanton to their own use, and no part thereof was ever paid to the city of Santa Cruz (Testimony of Williams, Rec., p. 48). The First National Bank of Worcester, Mass., received from Coffin & Stanton twenty-two of said bonds on July 20, 1894, as collateral security for a note of that firm (Rec., p. 102). The First National Bank of Hagerstown, Md., on July 18th, 1894, received from Coffin & Stanton six of said bonds as collateral security for a note of that firm (Rec., pp. 104 to 106). The Albany City National Bank, on July 25, 1894, received eleven of said bonds from Coffin & Stanton as collateral security for a note of that firm (Rec., pp. 106. The South Norwalk Savings Bank received eleven of said bonds from Coffin & Stanton on July 26, 1894, as collateral security for a note of that firm (Rec., p. 109). The Bank of Skaneatles received seven of said bonds from Coffin & Stanton on Jule 7, 1894, as collateral security for a note of that firm (Rec., p. 210). The Farmers' National Bank received four of

said bonds from Coffin & Stanton in June, 1894, as collateral security for a note of that firm (Rec., p. 113). The Kenduskeag National Bank received twelve of said bonds from Coffin & Stanton on May 29, 1894, as collateral security for a note of that firm (Rec., p. 114). The National Bank of Waterville received one of said bonds from Coffin & Stanton on May 3, 1894, as collateral security for the payment of a note of said firm (Rec., p. 118). The First National Bank of Webster, Mass., received one of said bonds from Coffin & Stanton on May 3, 1894, as collateral security for a note of that firm (Rec., pp. 121-2). Martin's Bank, Limited, of London, received from Coffin & Stanton, on May 28, 1894, eight of said bonds as collateral security for a note executed by said firm (Rec., pp. 123 to 128). The Northern Counties Investment Trust Company received from Coffin & Stanton three of said bonds in September, 1894, as collateral security for a note of said firm (Rec., pp. 128-9).

The testimony further shows that neither said Stanton nor said Coffin & Stanton ever made any return of money or other proceeds obtained for or upon any of said bonds (Testimony of Charles E. Williams, Rec., p. 218).

The foregoing testimony, none of which is contradicted or questioned, shows the method pursued by Coffin & Stanton in disposing of the bonds and appropriating the proceeds thereof at the earliest moment possible after receiving the same from the city of Santa

Cruz; and shows not only the immediate sale and hypothecation thereof for the benefit of the firm, but that the purpose so to dispose of them and appropriate the proceeds was present in the minds of Coffin & Stanton at the time of receiving the bonds.

The finding above requested is, we think, supported by the evidence, and should have been made, because it is material as showing that, under the laws of California, the act of Coffin & Stanton in obtaining possession of the bonds, with the felonious intent to deprive the city of Santa Cruz of the bonds and their proceeds, to sell them and hypothecate them for their own use, established the charge made in our answer that said bonds were stolen from the city of Santa Cruz.

People *vs.* Smallman, 55 Cal., 185.
People vs. Shaughnessy, 110 Cal., 598.

A municipality is not liable for stolen bonds in the hands of a bona fide purchaser for value.

German Savings Bank *vs.* Village of Suspension Bridge, 73 Hun. (N. Y.), 590.

2.

The court erred in refusing to make the finding of fact set forth in Specification of Error No. V (supra, p. 53), for the reason and upon the evidence set forth in the discussion of the last point, and the evidence set

forth and referred to in said Specification of Error No. V.

3.

The Court erred in refusing to make the finding of fact set forth in the Specification of Error No. VI (supra, p. 54), for all of the reasons and upon the evidence specified in our discussion of Specification of Error No. IV, and by reason of the evidence cited and referred to in said Specification of Error No. VI.

4.

The court erred in refusing to make the additional finding of fact set forth in Specification of Error No. VII (supra, pp. 54 to 59), for the reasons set forth in said specification, because it appears from the findings of fact and from the statutes of California, of which this Court takes judicial notice (Findings 1, 2 and 3, Rec., pp. 19 to 23 and 26 to 41), that the bonds and coupons in question, and each and all thereof, constituted an issue in excess of the limitation imposed by law upon the contraction of indebtedness by the city of Santa Cruz; and the findings further show that the evidence that said bonds did constitute an over-issue was matter of public record required by law to be kept by the officers of the city of Santa Cruz, and, as such, was open to the inspection of all intending purchasers of such bonds, and to the whole world.

(Statutes involved, supra, Sec. 9, p. 33; Secs. 10 and

15, pp. 34-5; Sec. 40, p. 35. Findings Nos. 5, 6, 7, 10, Rec., pp. 19 to 23; Additional Findings Nos. 1 and 2, Rec., pp. 26 to 39.)

5.

The court erred in refusing to make the additional finding of fact set forth in Specification of Error No. VIII (supra, p. 60), for the reasons stated in said specification.

The refusal of a trial court finding the facts and conclusions of law to find every fact material to its conclusion, if properly excepted to, is ground of reversal.

The E. A. Packer *vs.* N. J. Lighterage Co., 140 U. S., 360.

X.

THE CIRCUIT COURT ERRED, TO THE PREJUDICE OF DEFENDANT, IN MAKING CERTAIN FINDINGS OF FACT, CONTRARY TO ALL OF THE EVIDENCE, AS HEREINAFTER IN THE DISCUSSION OF THIS POINT SPECIFIED.

1.

The court erred in making, at the suggestion of plaintiff, the additional finding of fact set forth in Specification of Error No. IX (supra, pp. 61 to 64), for the reasons set forth in said specification.

2.

The court erred in making, at the suggestion of plaintiff, the finding of fact set forth in Specification of Error No. X (supra, p. 65), for the reasons set forth in said specification, because said finding, in its essential part, namely: that F. H. Prince & Co. employed Dickinson, on their own account and for themselves and not acting as agents of E. G. & E. Wallace, to give his opinion in relation to the validity of such bonds, is contrary to all of the evidence, and the whole thereof, on the subject of the employment of said Dickinson to render an opinion on the question of the validity of said bonds, consisting of the testimony of Mr. Sumner Wallace (Rec., pp. 99 to 102) and Mr. F. H. Prince (Rec., pp. 245 to 251).

3.

The court erred in making the findings set forth in Specification of Error No. XI (supra, p. 66), for the reasons set forth in said specification, and because said finding is contrary to all of the evidence on the subject in the case, as shown by the testimony referred to and cited in said specification.

4.

The court erred in making the portion of Original Finding No. 8, set forth in Specification of Error No. XII (supra, pp. 66-8), upon the grounds and for the reasons stated in said specification.

5.

The court erred in making that portion of Finding of Fact No. 12 which is set forth in Specification of Error No. XIII (supra, p. 68), for the reasons set forth in said specification at (supra, pp. 68 to 81), and in Specification of Error No. XIV at (supra, pp. 81-4).

6.

The court erred in making that portion of Finding of Fact No. 12 set forth in Specification of Error No. XV, for the reasons set forth in said specification (supra, p. 84).

7.

The Court erred in making that portion of Finding of Fact No. 12 which is set forth in Specification of Error No. XVI (supra, p. 85), for the reasons set forth in said specification (supra, pp. 85-7).

XI.

THE CIRCUIT COURT ERRED, TO THE PREJUDICE OF DEFENDANT, IN FAILING TO DETERMINE CERTAIN MATERIAL ISSUES OF FACT RAISED BY THE PLEADINGS, AS HEREINAFTER, IN THE DISCUSSION OF THIS POINT, SPECIFIED, AND IN RENDERING JUDGMENT AGAINST DEFENDANT ON INSUFFICIENT FINDINGS. *(Assignments of Error No. 51, Rec., p. 297; No. 52, Rec., p. 300; No. 56, Rec., p. 300; No. 57, p. 300; No. 59, Rec., p. 301.)*

Specifications,
Supra pp. 87 to 92.

1.

The court erred in failing to make any finding of fact on the issue joined by defendant's answer, as set forth in Specification of Error No. XVII (supra, pp. 87-8), for the reasons set forth in said specification upon said pages.

2.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XX (supra, pp. 89-90), for the reasons set forth in said specification.

3.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XXI, for the reasons set forth in said specification (supra, p.

4.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XXII (supra, p. 91).

5.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XXIII (supra, p. 91), for the reasons set forth in said specification.

6.

The court erred in failing to make any finding of fact

on the issues set forth in Specification of Error No. XXIV (supra, pp. 91-2).

7.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XXV (supra, p. 92), for the reasons set forth in said specification.

The court in this case made special findings of fact, and should, therefore, have specifically determined every material issue of fact presented by the pleadings.

Baggs *vs.* Smith, 53 Cal., 88-90.
Shaw *vs.* Wandesforde, 53 Cal., 300.
Taylor *vs.* Reynolds, 53 Cal., 686-9.
O'Connor *vs.* Frasher, 53 Cal., 435-6.
Knight *vs.* Roche, 56 Cal., 25.

This is the unquestionable rule in the State courts, under statutes providing for findings of fact in an action at law tried by the court without a jury, and, while the finding of a United States circuit court in such a case may be general—for the plaintiff or for the defendant—and not subject to review for insufficiency; yet, if the findings be special, as in this case, they must respond to and cover all of the material issues made by the pleadings.

The E. A. Packer *vs.* New Jersey Lighterage Co., 140 U. S., 360.

The findings required by the statute, when stated by the Court, are "part of the record, without any action "of the parties; and errors of law arising on them need "not be presented by bill of exceptions."

Nickerson *vs.* Merchants SS. Co. of Charleston, 105 U. S., 267.

Where the findings are special, this Court may review the sufficiency of the facts found by the trial court to support the judgment.

Mercantile Mutual Ins. Co. *vs.* Folsom, 18 Wall., 237.

Boardman *vs.* Toffey, 117 U. S., 271.

On trial by the court without a jury, in an action at law, the sufficiency of the findings, if special, to support the judgment, may be considered by this Court.

Ryan *vs.* Carter, 93 U. S., 78.

Jennison *vs.* Leonard, 21 Wall., 302.

Brooklyn Life Ins. Co. *vs.* Miller, 12 Wall., 285.

The findings of the court below are to be considered in this Court in connection with the pleadings.

O'Reilly *vs.* Campbell, 116 U. S., 418.

Special findings "are in the nature of a special ver- "dict, as to which the inquiry is always open in the re-

"viewing court, whether, when taken in connection "with everything else that appears, it is sufficient to "support the judgment."

Nickerson *vs.* Merchants' Steamship Co., 105 U. S., 267.

Evans *vs.* Kister, 92 Fed., 832, and cases cited.

Tested by this rule, the failure of the court to find upon the issues raised by the defendant's answer, as to the larcenous taking of the bonds from the city of Santa Cruz (Fourth Defense, Ans. I, Rec., p. 15; Specification of Error No. XXIII, supra, p. 91); and as to their fraudulent taking (Ans., Sixth Defense II, Rec., p. 17; Specification of Error No. XXVI, supra, pp. 92-3), renders the findings insufficient to support the judgment; because, if all the facts found by the circuit court be conceded, plaintiff (petitioner here) was not entitled to judgment if it be also true, as alleged in the answer, that Walter Stanton either fraudulently or larcenously took the bonds from the city of Santa Cruz.

Reading the findings in connection with the pleadings, we have this result: Plaintiff alleges (Rec., p. 6) that all of the bonds and coupons in question were sold and delivered by the city of Santa Cruz to Walter Stanton, and that Walter Stanton sold and delivered them to him. The court finds that "all of said bonds and "coupons were assigned to plaintiff for collection only" (Rec., p. 19).

The court finds that "all of the bonds and coupons "referred to in the amended complaint were, prior to "the commencement of this action, duly assigned to "plaintiff" (Rec., p. 18); that three of said coupons were assigned to plaintiff by the Northern Counties Investment Trust Company (Rec., p. 18), and that 150 bonds and coupons were assigned to plaintiff by the firm of E. G. & E. Wallace (Rec., p. 24), but does not find the number of bonds or coupons assigned to plaintiff for collection by Walter Stanton, as alleged in the complaint (Rec., p. 6), or by the firm of Coffin & Stanton.

All of the bonds and coupons in question have been traced into the hands of Coffin and Stanton by the findings (Rec., p. 23), and, as only 153 thereof have been traced out of their hands, the fair presumption, if any presumption can be indulged, is that the remaining 129 bonds and coupons were assigned to plaintiff for collection, especially as he alleges that they were all sold and delivered to him by Walter Stanton (Rec., p. 6).

Certainly, Walter Stanton could not, and the firm of Coffin & Stanton could not, either directly or through an assignee "for collection only," recover from the city of Santa Cruz, on the bonds and coupons in question, if it appeared, as alleged in the answer, that Walter Stanton stole the bonds, or fraudulently took them from the city; and as it does not appear from the record what portion, if any, of the judgment is based upon bonds or coupons assigned to plaintiff by Coffin and

Stanton, or by Walter Stanton, for collection only, the judgment of the circuit court was erroneous on that ground.

It further appears that the findings are insufficient to support the judgment of the circuit court, because it appears therefrom that Coffin & Stanton obtained all of the bonds in question from the city of Santa Cruz unlawfully and without consideration (Rec., pp. 22-4); that plaintiff is an assignee of said bonds, without valuable consideration, "for collection only" (Rec., p. 18), and, as to at least 129 of said bonds and coupons, it does not appear that they or any of them were, or was, ever purchased or held by any innocent purchaser or holder for value, or for any consideration whatever, and the Court below has expressly found and declared that all of the bonds and coupons are invalid except in the hands of innocent purchasers for value, without notice of any fact tending to show invalidity (Rec., pp. 18-20, 22-3, 25, 52).

In addition to this, the circuit court, in its opinion, referring to the agreement under which the bonds were delivered to Coffin and Stanton, says: "Certainly, the "delivery of the bonds under such an agreement was a "gross violation of the statute" (Rec., p. 59).

XII.

THE CIRCUIT COURT ERRED IN OVERRULING DEFENDANT'S DEMURRER TO THE AMENDED COMPLAINT HEREIN, AND IN RENDERING JUDGMENT AGAINST THE DEFENDANT, BECAUSE IT DOES NOT APPEAR FROM SAID COMPLAINT, NOR FROM THE RECORD HEREIN, THAT THE COURT HAD JURISDICTION OF THE ACTION.

It appears upon the face of the complaint (Rec., p. 6) that the bonds and coupons in question were originally sold and delivered to one Walter Stanton, who afterwards sold the same to the plaintiff herein, and it does not appear from the complaint that the original payee of said bonds could have maintained an action thereon in the United States circuit court. It further appears from the findings of fact herein that the bonds and coupons in question were, before the commencement of the action, assigned to plaintiff, and that "the plaintiff did "not pay any money consideration for the assignment "to him of any of said bonds or coupons, but all of said "bonds or coupons were assigned to plaintiff for collec-"tion only" (Findings 1 and 2, Rec., p. 18).

It further appears from said findings that more than 153 of the bonds and coupons in question were assigned to plaintiff for collection by persons other than Walter Stanton, the original payee of said bonds (Findings 3 and 12, Rec., pp. 18-19, 24), and it does not appear from the record herein that said assignors of plaintiff, or any

of them, could have maintained an action in the United States circuit court on said bonds or coupons, or any of them.

"Where the jurisdiction is founded only on the fact " that the action is between citizens of different States, " suit shall be brought only in the district of either the " plaintiff or the defendant; nor shall any circuit or dis- " trict court have cognizance of any suit, except upon " foreign bills of exchange, to recover the contents of any " promissory note or other chose in action, in favor of " any assignee, or of any subsequent holder, if such in- " strument be payable to bearer and be not made by any " corporation, unless such suit might have been prose- " cuted in such court to recover the said contents if no " assignment or transfer had been made."

> Act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the Act of Aug. 13, 1888, c. 866, 25 Stat. 433, defining the jurisdiction of the district and circuit courts of the United States.

"A question of jurisdiction cannot be waived."

> Mexican N. R. R. *vs.* Davidson, 157 U. S., 208.
> Metcalf *vs.* Watertown, 128 U. S., 586.
> Mansfield Ry. Co. *vs.* Swan, 111 U. S., 379.
> Capron *vs.* Van Worden, 2 Cranch., 126.

"Whether that court had or had not jurisdiction, is a " question which we must examine and determine, even

"if the parties forbear to make it, or consent that the "case be considered upon its merits."

Metcalf *vs.* Watertown, 128 U. S., 587.

"According to the uniform decisions of this court, the "jurisdiction of the circuit court fails unless the neces- "sary citizenship affirmatively appears in the pleadings "or elsewhere in the record."

Mansfield Ry. Co. *vs.* Swan, 111 U. S., 382.

"If the citizenship of the original payee is material to "the jurisdiction of the court, it is essential to plain- "tiff's case to make it affirmatively appear upon the "record. Parker *vs.* Ormsby, 141 U. S., 81; 11 Sup. "Ct. Rep., 912, and cases there cited not so appearing, "it is proper to discuss the case, *sub lite*, as if it did ap- "pear that the original parties to the note, for whose "contents this suit is brought, were, at the time of bring- "ing the action, citizens of the same State."

U. S. Nat. Bk. *vs.* McNair, 56 Fed. Rep., 324.

"The term 'chose in action' is one of comprehensive im- "port. It includes the infinite variety of contracts, cov- "enants and promises which confer on one party a right "to recover a personal chattel or a sum of money from "another by action."

Sheldon *vs.* Sill, 8 How., 449.
Mex. Nat. R. R. *vs.* Davidson, 157 U. S., 206.

"We do not think that the words 'if such instrument
" 'be payable to bearer and be not made by any corpora-
" 'tion' limit the comprehensiveness of 'chose in action'
" as construed under the act of 1789; and as this cause
" of action is based on contract, we are of opinion that it
" is within the definition heretofore ascribed to the words
" 'to recover the contents of a chose in action.' This
" being so, it follows that the action could not have orig-
" inally been brought in the circuit court of the United
" States by Davidson, the assignee of a Colorado corpora-
" tion, against a Colorado corporation."

Mex. Nat. R. R. *vs.* Davidson, 157 U. S., 206-7.

If it be suggested that the holder of a negotiable instrument payable to bearer has a right to sue the maker in the United States circuit court, regardless of the citizenship of former holders, because his title does not come to him by assignment, but by a direct contract with the maker (Town of Thompson *vs.* Perrine, 106 U. S., 589-92), we answer that plaintiff (petitioner) is not within that rule, because the findings show that his title rest upon an assignment "for collection only" (Rec., p. 34).

The rule in Perrine's case, above stated, has, we think, been abrogated by the amendments to the statute (Acts of March 3, 1887, and Aug. 13, 1888), but, assuming it to be still in force, plaintiff (petitioner) is not within it, because his complaint and the findings, above cited, show

that he is a mere assignee of a chose in action, for collection only.

We submit that the decision of the circuit court of appeals, reversing the judgment of the circuit court, should be affirmed, upon the ground and for the reason stated in the prevailing opinion of that court.

And we further submit that, if this Court should hold the views expressed in the prevailing opinion of the circuit court of appeals to be erroneous, yet the judgment of the circuit court should be reversed upon the other points discussed in this brief, all of which were presented to and argued before the circuit court of appeals, but not considered or decided by that court, for the reasons stated in its opinion (Rec., p. 315).

Respectfully submitted,

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